Supreme Court, U.S.
FILED

961358 FEB 25 1997

OFFICE OF THE CLERK

Case No. _____

*IN THE*
*SUPREME COURT OF THE UNITED STATES*
*OCTOBER TERM 1996*

---

*MARIA M. OCHOA,*
*Petitioner*

*v.*

*FEDERAL COMMUNICATIONS COMMISSION and*
*the UNITED STATES OF AMERICA,*
*Respondents*

---

*On Petition for Writ of Certiorari*
*to the United States Court of Appeals*
*for the District of Columbia Circuit*

---

# *PETITION FOR WRIT OF CERTIORARI*

---

*Stephen T. Yelverton, Esq.*
*Counsel of Record*
*Yelverton Law Firm, P.C.*
*1101 30th St., N.W.,*
*Suite 500*
*Washington, D.C. 20007*
*Tel. 202-625-4321*

41pp

## QUESTIONS PRESENTED FOR REVIEW

Whether, consistent with the "due process" clause of the Fifth Amendment and consistent with In Re Ruffalo, 390 U.S. 544, 551-552 (1968), and In Re Oliver, 333 U.S. 257, 273-278 (1948), a Federal agency, without notice to an applicant at a hearing as to charges of disqualifying deceit by him or her purportedly occurring at the hearing, can after the hearing is concluded raise for the first time charges of such disqualifying deceit and then sanction and disqualify that applicant before the agency based upon the post-hearing charges of disqualifying deceit, and whether RKO General, Inc. v. FCC, 670 F.2d 215, 231-236 (D.C. Cir. 1981), is in conflict with precedent of this Court and should be overruled to the extent that RKO would allow disqualification in such circumstances?

Whether a Federal agency's reliance upon "inferences" from hearing testimony to find deceit or conflicts in testimony to serve as a basis to impose the sanction of disqualification against an applicant is contrary to Steadman v. SEC, 450 U.S. 91, 101 (1981), which requires use of the "preponderance of [substantial] evidence" standard to impose such disqualification?

Whether a disqualified applicant before a Federal agency, who is a minority female, has standing as a "private attorney general" to challenge the grant of a competing applicant in order to raise issues of disparate and discriminatory

treatment by the Federal agency, where it improperly favored a white male applicant over the minority female applicant?

## PARTIES TO THE PROCEEDING

The parties to the proceeding in the U.S. Court of Appeals for the D.C. Circuit were Maria M. Ochoa, appellant, the Federal Communications Commission, appellee, and Foothills Broadcasting, Inc., intervenor.

Maria M. Ochoa is an individual and natural person.

## TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED FOR REVIEW . . . . . i-ii

PARTIES TO THE PROCEEDING . . . . . iii

TABLE OF CONTENTS . . . . . iv-v

TABLE OF AUTHORITIES . . . . . vi-x

OPINIONS BELOW . . . . . 1

JURISDICTION . . . . . 2

CONSTITUTIONAL PROVISIONS . . . . . 2

STATEMENT OF THE CASE . . . . . 2

REASONS FOR GRANTING THE PETITION . . . . . 13

(a) No Notice at the Hearing as to Charges of Disqualifying Deceit . . . . . 13

(b) Improper Use of Inferences from Hearing Testimony to Find Deceit or Conflicts in Testimony . . . . . 22

Page(s)

(c) Standing as a "Private Attorney General" to Challenge Disparate and Discriminatory Actions by a Federal Agency in Granting a Competing Applicant . . . . . 25

CONCLUSIONS . . . . . 30

# TABLE OF AUTHORITIES

Page(s)

## Federal Agency Decisions

Evansville Skywave, Inc.,
7 FCC Rcd 1699 (1992) . . . . . 16

Policy Statement on
Comparative Hearings,
1 FCC2d 393 (1965) . . . . . 3-4, 19

Silver Star Communications-
Albany, Inc., 6 FCC Rcd
6905 (1991) . . . . . 23

## Federal Court Decisions

Bechtel v. FCC, 957 F.2d 873
(D.C. Cir. 1992) . . . . . 28

Bechtel v. FCC, 10 F.3d 875
(D.C. Cir. 1993) . . . . . 4

Cole v. Arkansas, 333 U.S. 196
(1948) . . . . . 15

Consolo v. FMC, 383 U.S. 607
(1966) . . . . . 22-23

Faulkner Radio, Inc. v. FCC,
557 F.2d 866 (D.C. Cir. 1977) . . . 28

Garden State Broadcasting Ltd.
Partnership v. FCC, 996 F.2d
386 (D.C. Cir. 1993) . . . . . 25, 30

Page(s)

Gray v. Netherland, 116 S.Ct. 2074 (1996) . . . . . 14

Honda Motor Co., Ltd. v. Oberg, 114 S.Ct. 2331 (1994) . . . . . 15

In Re Oliver, 333 U.S. 257 (1948) . . . . . 13-14, 20-21

In Re Ruffalo, 390 U.S. 544 (1968) . . . . . 13-15, 18-21

Jacksonville Broadcasting Corp. v. FCC, 348 F.2d 75 (D.C. Cir. 1965) . . . . . 25

MCI Telecommunications Corp. v. FCC, 758 F.2d 722 (D.C. Cir. 1985) . . . . . 17

Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965) . . . 26

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) . . . . . 3

National Federation of Federal Employees v. Cheney, 883 F.2d 1038 (D.C. Cir. 1989) . . . . . 29

Radio Athens, Inc. v. FCC, 401 F.2d 398 (D.C. Cir. 1968) . . . 16

Page(s)

RCA Global Communications, Inc. v. FCC, 758 F.2d 722 (D.C. Cir. 1985) . . . . . 17

RKO General, Inc. v. FCC, 670 F.2d 215 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982) . . . . . 13, 20-21

Satellite Broadcasting Co., Inc. v. FCC, 824 F.2d 1 (D.C. Cir. 1987) . . . . . 16

Steadman v. SEC, 450 U.S. 91 (1981) . . . . . 22

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) . . . 26

West Coast Media, Inc. v. FCC, 695 F.2d 617 (D.C. Cir. 1982) . . . 19

Williams v. Smith, 399 U.S. 78 (1970) . . . . . 19

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) . . . . . 19

Page(s)

U.S. Constitution

Fifth Amendment . . . 2, 14, 18, 20-21, 27, 30

Miscellaneous

Webster's University Dictionary (1984) . . . . . 24

Opinions and Orders on Review (Chronological Order)

Hearing Designation Order, 5 FCC Rcd 7079 (1990) . . . . . 2

Memorandum Opinion and Order, FCC 91M-1475, rel. April 26, 1991 . . . . . 6

Initial Decision, 7 FCC Rcd 1861 (ALJ 1992) . . . . . 7, 11, 17, 27

Decision, 7 FCC Rcd 6569 (Rev. Bd. 1992) . . . . . 8, 11, 27

Memorandum Opinion and Order, 8 FCC Rcd 3135 (1993) . . . . . 8, 11

Memorandum Opinion and Order, 9 FCC Rcd 56 (1993) . . . . . 9, 11

Supplemental Initial Decision, 9 FCC Rcd 3100 (ALJ 1994) . . . . 11-12

Page(s)

Order, 10 FCC Rcd 142 (1995) . . . . . 10

Decision, 10 FCC Rcd 4323 (Rev. Bd. 1995) . . . . . 12

Order, 10 FCC Rcd 8746 (1995) . . . . 12

Order, Case No. 95-1092, filed June 6, 1995 . . . . . 10

Order, Case No. 95-1092 and Consolidated Case No. 95-1444, filed October 6, 1995 . . . . . 12

Judgment, filed September 23, 1996 . . . . . 2, 12, 25

Orders, filed November 27, 1996 . . . . . 2, 12

*Case No. _____*

*IN THE*
*SUPREME COURT OF THE UNITED STATES*
*OCTOBER TERM 1996*

---

*MARIA M. OCHOA,*
*Petitioner*

*v.*

*FEDERAL COMMUNICATIONS COMMISSION and*
*the UNITED STATES OF AMERICA,*
*Respondents*

---

*On Petition for Writ of Certiorari*
*to the United States Court of Appeals*
*for the District of Columbia Circuit*

---

*PETITION FOR WRIT OF CERTIORARI*

---

## OPINIONS BELOW

The Judgment and the Orders on rehearing and hearing in banc of the U.S. Court of Appeals for the D.C. Circuit denying the relief requested by the petitioner, Maria M. Ochoa, are cited in the Table of Authorities and are included in the Appendix. The Judgment and Orders of the D.C. Circuit are unreported.

## JURISDICTION

The D.C. Circuit entered its Judgment on September 23, 1996, in Case No. 95-1092 and Consolidated Case No. 95-1444, denying the appeals of Ochoa from the decisions of the Federal Communications Commission (App. 121a). Ochoa's petitions for rehearing and for hearing in banc were denied in Orders, filed November 27, 1996 (App. 140a). The jurisdiction of this Court is timely invoked under 28 U.S.C. Section 1254 (1). The Solicitor General and the FCC have been served with copies of this petition for writ of certiorari.

## CONSTITUTIONAL PROVISIONS

The Constitutional provision cited herein is the Fifth Amendment of the U.S. Constitution, which provides that no person shall be deprived of life, liberty, or property without due process of law.

## STATEMENT OF THE CASE

Ochoa's petition arises out of a Federal Communications Commission ("FCC") "comparative" hearing proceeding under the "standard comparative issue" to select the permittee for a new FM radio broadcast frequency in Lenoir, North Carolina. It is a small and virtually all-white town in the western part of the state. Ochoa's application was designated by the FCC for hearing for comparison with the application of Foothills Broadcasting, Inc. ("Foothills"). Hearing Designation Order, 5 FCC Rcd 7079 (1990) (App. 1a-7a).

Ochoa is a an individual applicant and an Hispanic female of Cuban origin. She had previously never filed an FCC "comparative" application, but has substantial past broadcast experience as a General Sales Manager and as a salesperson at several radio stations in North and South Carolina (App. 24a, 34a-35a).

The FCC proceeding was initiated pursuant to the Policy Statement on Comparative Hearings, 1 FCC2d 393 (1965), which utilized the "integration" of ownership into management as the primary criteria for selecting a permittee. In her "integration" proposal, Ochoa pledged at the hearing to move to Lenoir with her family from nearby Charlotte in order to be the full-time on-site General Manager of the proposed station. This pledge was conditioned upon her application being granted (App. 25a-26a).

The principals of Foothills are local residents of Lenoir and are white males (App. 37a-41a). They were not entitled, as was Ochoa, to a then Congressionally mandated preference for minority status. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 566 (1990).

Foothills is a corporation with voting and non-voting stockholders. This structure was artificially devised to maximize its "integration" credit. In its "integration" proposal, John Beall, a voting stockholder, pledged to be a part-time on-site Station Manager. Steven Frank, a voting stockholder, pledged to be

a full-time on-site News and Program Director. Wallace Respess, a non-voting stockholder, made no "integration" pledge because he is a full-time practicing attorney. In view of his non-voting status, this would not normally discount the "integration" credit for Foothills (App. 18a-19a, 24a, 37a).

Under the then applicable "comparative" selection criteria, which was "integration" of ownership into management, Ochoa would have prevailed. This is based upon her pledge to move to Lenoir to be a full-time on-site manager of the station, along with her minority and female status and past broadcast experience. Policy Statement on Comparative Hearings, 1 FCC2d 393. In such circumstances, Foothills could prevail if Ochoa was denied "integration" credit or disqualified because of deceit.

After the hearings were held in the FCC proceeding under the "standard comparative issue," the D.C. Circuit ruled that use of the "integration" criteria was inherently "arbitrary and capricious" and therefore unlawful. The FCC then suspended its use. Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993).

## Application of Ochoa

During the hearing, Foothills sought to discredit, under the "standard comparative issue," Ochoa's hearing pledge to move to Lenoir to effectuate her "integration" proposal. It solicited as

"surprise" witnesses four former co-workers of Ochoa to show that she would not move to Lenoir. Foothills' witnesses testified as to purported conversations they had with Ochoa as to her Lenoir application prior to the hearing. The conversations were prior to Ochoa making to the FCC her pledge to move to Lenoir to effectuate her "integration" proposal, if her application was granted (App. 25a-30a, 83a, 141a-145a).

Foothills' "surprise" witnesses were known to be hostile to Ochoa, were friendly with each other, and had discussed their testimony with each other prior to testifying (App. 102a-103a). One of the Foothills' witnesses, Jake Gurley, had lost his job as General Manager of a Charlotte radio station only months earlier because of Ochoa's allegations against him of sexual harassment (App. 102a, 106a).

Johnny Jacobs, another Foothills' "surprise" witness, had been friendly with a competing applicant and recently had his salary cut because of Ochoa (App. 103a, 118a). Another Foothills' "surprise" witness, Reta Thorn, was hired by Foothills as an employee and manager of the Lenoir station after the conclusion of the FCC hearing (App. 108a).

At the request of Foothills, the ALJ had issued an ex parte subpoena for Thorn to testify as a "surprise" witness against Ochoa under the "standard comparative issue." Although Foothills had known

about Ochoa's anticipated testimony from depositions several months prior to the hearing, it did not make its ex parte subpoena request for Thorn until the eve of the hearing (App. 141a-145a).

After Foothills' "surprise" witnesses testified against Ochoa as to purported conversations they had with her about her Lenoir application, the ALJ refused Ochoa's request to subpoena Vanessa Keys to refute their testimony. Keys had been privy to many of the conversations in question. According to the ALJ, Keys' testimony was not needed because the matter --- Ochoa's pledge at the hearing to move to Lenoir --- was a "narrow comparative point." Memorandum Opinion and Order, FCC 91M-1475, para. 2, rel. April 26, 1991 (App. 8a).

At no time during the hearing, did the ALJ ever state or indicate to Ochoa that her truthfulness or "character" qualifications were in issue because she had given or had admitted to giving inconsistent, misleading, candorless, deceitful, or false testimony, or had changed or revised her testimony or had concealed material information, which could result in her being disqualified as a "liar." In fact, the ALJ stated or indicated during all stages of the hearing that the only matter in issue was the effectuation of Ochoa's "integration" proposal, under the "standard comparative issue," as to her pledge to move to Lenoir, if her application was granted (App. 5a, 8a-9a, 25a, 125a, 141a-151a).

Foothills never sought the specification of a disqualifying character" issue against Ochoa because she had purportedly given or had admitted to giving inconsistent, misleading, candorless, deceitful, or false testimony, or had changed or revised her hearing testimony or had concealed material information. All of the record testimony and evidence it presented against Ochoa was under the "standard comparative issue" (App. 25a, 46a, 51a, 125a, 141a-151a). Indeed, Foothills' ex parte request to the ALJ to subpoena Thorn as a "surprise" witness was made under the "standard comparative issue" (App. 141a-145a).

The Initial Decision, 7 FCC Rcd 1861, 1864-1866, 1869-1870 (ALJ 1992), raised for the first time issues of deceit against Ochoa. It acknowledged that she did not have notice at the hearing of charges against her of disqualifying deceit (App. 47a-48a, 84a, 127a).

Nevertheless, the I.D. disqualified Ochoa as a "liar" because it inferred that she had "substantially changed and revised her hearing testimony," because it inferred that she purportedly "concealed material information" at the hearing, and because, according to the Foothills' witnesses, she purportedly testified "falsely." This was with respect to her "integration" proposal and pledge at the hearing, under the "standard comparative issue," to move to Lenoir (App. 25a-33a, 46a-47a, 145a-151a).

In Decision, 7 FCC Rcd 6569, 6570-6572 (1992), the Review Board affirmed Ochoa's disqualification as a "liar." It held that specific notice at the hearing to an applicant by the FCC that they must testify truthfully, or that their testimony is considered to be untruthful, is superfluous (App. 58a, 84a).

Ochoa was disqualified on the basis of the Board's inference that she had given "inconsistent and candorless" testimony at the hearing as to her conversations with Foothills' witnesses with respect to her pledge at the hearing to move to Lenoir. According to the Board, Ochoa did not testify "candidly." Ochoa purportedly "explicitly" testified that she told co-workers (Foothills' witnesses) she "would move" to Lenoir, but at the end of the hearing, it inferred that she "disavowed" this testimony (App. 51a-61a, 78a-80a, 141a-151a).

In Memorandum Opinion and Order, 8 FCC Rcd 3135, 3136-3137 (1993), the FCC affirmed Ochoa's disqualification as a "liar." It held that the lack of notice to Ochoa at the hearing of charges of disqualifying deceit was a "mere technicality" (App. 84a). The FCC disqualified Ochoa based on its inference that she had given "deceitful" testimony at the hearing. It inferred that there is a "significant difference" between Ochoa's initial and subsequent hearing testimony as to her conversations with co-workers (Foothills' witnesses) with respect to her pledge at the hearing to move to Lenoir.

The FCC thus concluded that her initial testimony was "deliberately misleading" (App. 81a-92a, 145a-151a).

The conflict or discrepancy which the FCC inferred from Ochoa's testimony was her initial testimony that she "intended to move to Lenoir" and its characterization of her later testimony that she "deliberately lead [Foothills' witnesses] to believe that there was little or no chance that she would move to Lenoir." According to the FCC, Ochoa gave no indication in her initial hearing testimony that she had said anything that could have caused anyone to suppose that she did not mean to carry out her "integration" pledge at the hearing to move to Lenoir (App. 85a-86a, 145a-151a).

The FCC also disqualified Ochoa for "deceit" on the basis that Ochoa's hearing testimony was contradicted by Foothills' witnesses and she had not refuted their testimony as to her conversations with them (App. 86a-92a). However, the FCC ruled that the ALJ did not commit reversible error by refusing Ochoa's request to subpoena Vanessa Keys who was privy to the conversations between Ochoa and Foothills' witnesses (App. 92a).

The FCC in Memorandum Opinion and Order, 9 FCC Rcd 56, 57-59 (1993), denied Ochoa's petition for reconsideration. It affirmed its holding that Ochoa had not been denied "due process" by lack of notice at the hearing of charges of disqualifying deceit (App. 97a). The FCC

affirmed Ochoa's disqualification based on "misrepresentations," "outright lies," and "repeated lies" (App. 93a, 96a-107a).

The FCC's holding was based upon "discrepancies" which it inferred from Ochoa's hearing testimony that she had been "less than candid" in initially responding to cross-examination questions about her conversations with Foothills' witnesses as to whether she intended to move to Lenoir. According to the FCC, Ochoa "conceded" in her concluding testimony that she had deliberately lead Foothills' witnesses to believe that there was little likelihood that she would ever quit her job and move to Lenoir (App. 93a, 96a-107a 145a-151a).

In Order, 10 FCC Rcd 142 (1995), the FCC denied Ochoa's petition for further reconsideration (App. 118a-119a). Ochoa timely filed a notice of appeal with the D.C. Circuit as to her disqualification and the denial of her application.

In Order, Case No. 95-1092, filed June 6, 1995, the D.C. Circuit directed that Ochoa's appeal be held in abeyance. This was because no final action had been taken by the FCC with respect to the application of Foothills.

## Application of Foothills

The ALJ formally specified misrepresentation issues against Foothills as to its ownership and control with respect to its "integration" proposal

(App. 10a). In Initial Decision, 7 FCC Rcd 1861, 1863-1864, 1869, Foothills was disqualified and its application denied. This was based on credibility findings by the ALJ that Wallace Respess, a non-voting stockholder who was represented not to be in control, is the actual "moving force" in the application, is his venture and under his control, and the voting stockholders follow his instructions (App. 18a-24a, 44a-46a).

However, the Review Board in Decision, 7 FCC Rcd 6569, 6575, reversed the credibility findings of the ALJ and granted the application of Foothills. It concluded that the role of Respess had not been misrepresented because it could discern no deceptive intent or abusive conduct (App. 51a, 68a-78a).

The FCC in Memorandum Opinion and Order, 8 FCC Rcd 3135, affirmed the grant of Foothills' application. It held that the testimony of Respess was not "fallacious" (App. 81a-82a). However, the FCC in Memorandum Opinion and Order, 9 FCC Rcd 56, 59-61, specified disqualifying issues as to whether Foothills had reasonable assurance of access to its proposed tower site. This included whether Foothills had attempted to deceive the FCC in pleadings in response to Ochoa's motions to enlarge the issues (App. 93a, 107a-117a).

In Supplemental Initial Decision ("S.I.D."), 9 FCC Rcd 3100, 3101-3103 (ALJ 1994), these specified issues were

resolved in favor of Foothills. The S.I.D. rejected the sworn testimony of four landowners that they had never given Foothills any assurance of access over their property to its proposed tower site. Their sworn testimony was considered to be the "pleasure of imagination." The S.I.D. failed to address the specified issue as to whether Foothills attempted to deceive the FCC in responses to Ochoa's motions.

In Decision, 10 FCC Rcd 4323 (1995), the Review Board affirmed the S.I.D. That decision was affirmed by the FCC in Order, 10 FCC Rcd 8746 (1995) (App. 120a). Ochoa timely filed a notice of appeal of the grant of Foothills' application. In Order, filed October 6, 1995, the D.C. Circuit consolidated that appeal with the earlier appeal of Ochoa as to her disqualification.

In Judgment, filed September 23, 1996, the D.C. Circuit denied the appeals of Ochoa (App. 121a). It held that Ochoa "should have been on notice that her candor was specifically at issue" (App. 133a). Moreover, because Ochoa had been disqualified by the FCC, she had no standing to challenge the grant of the application of Foothills. In any event, no evidence of deceit by Foothills was found. The Judgment was not reported (App. 137-139).

In Orders, filed November 27, 1996, Ochoa's petitions for rehearing and for hearing in banc were denied. These Orders were not reported (App. 140a).

## REASONS FOR GRANTING THE PETITION

(a) The petition for writ of certiorari raises an important question of Federal law, as to whether, consistent with the "due process" clause of the Fifth Amendment and consistent with In Re Ruffalo, 390 U.S. 544, 551-552 (1968) and In Re Oliver, 333 U.S. 257, 273-278 (1948), a Federal agency, without notice to an applicant at a hearing as to charges of disqualifying deceit by him or her purportedly occurring at the hearing, can after the hearing is concluded raise for the first time charges of such disqualifying deceit purportedly occurring at the hearing and then sanction and disqualify that applicant before the agency based upon the post-hearing charges of disqualifying deceit, and whether RKO General, Inc. v. FCC, 670 F.2d 215, 231-236 (D.C. Cir. 1981) is in conflict with precedent of this Court and should be overruled to the extent that RKO would allow disqualification in such circumstances?

The action of the FCC in sanctioning Ochoa by disqualifying her, as a broadcast applicant, for deceit without giving her notice at the hearing of the charge of disqualifying deceit, is a denial of "due

process" under the Fifth Amendment of the U.S. Constitution and is in conflict with precedent of this Court. In Re Ruffalo, 390 U.S. 544, 551-552 (1968), holds that where a sanction or penalty is imposed by an agency, the affected person is entitled to "procedural due process," which includes fair notice at the hearing of the charges of the alleged disqualifying misconduct.

A person's right to notice at the trial of the charges against which he must defend is well-established. Gray v. Netherland, 116 S.Ct. 2074, 2083 (1996), citing, In Re Ruffalo. The charges must be known before the proceedings or hearings commence. They become a trap when after the proceedings or hearings are underway, they are amended on the basis of the testimony of the accused. He is thus given no opportunity to expunge the earlier statements and start afresh. In Re Ruffalo, at 551-552.

The failure to afford a person a reasonable opportunity to defend himself or herself against the charge of false and evasive testimony is a denial of "due process" of law because the right to reasonable notice of the charges is basic to our system of jurisprudence. In Re Oliver, 333 U.S. 257, 273 (1948). "It is the law of the land that no [person's] life, liberty, or property be forfeited as a punishment until there has been a charge fairly made and fairly tried."

"No principle of procedural due

process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by the charge, are among the Constitutional rights of every [person]." Notice of the charges is a "safeguard essential to liberty in a government dedicated to justice under law." Cole v Arkansas, 333 U.S. 196, 201-202 (1948). Where there is a fundamental lack of "due process" in a proceeding, this Court will not hesitate to act. Honda Motor Co., Ltd. v. Oberg, 114 S.Ct. 2331, 2340 (1994).

Ochoa was disqualified and branded by the FCC as a "liar." However, it failed to give Ochoa notice at the hearing, or to confront her at the hearing, with the charge that she was at risk of the ultimate sanction of disqualification because her truthfulness or "character" qualifications had been put into issue based upon the testimony which opposing witnesses had given against her, or based upon testimony which she had given (App. 8a, 25a, 125a, 141a-151a). As held in In Re Ruffalo, 390 U.S. at 551-552, the absence of fair notice as to the precise nature of the charges deprives a person of procedural "due process."

Although the FCC held a rebuttal hearing to consider the testimony of opposing witnesses who contradicted Ochoa's testimony, the ALJ repeatedly indicated that the matters in question were with respect to the "standard comparative issue" (App. 8a, 25a, 125a,

141a-151a). Thus, Ochoa only had notice that the effectiveness of her comparative "integration" proposal to move to the city of license was in issue, not her candor.

The fact that two opposing witnesses give testimony which contradicts the other does not per se raise an issue that one of them is a "liar" (App. 125a). Under the "standard comparative" issue, when two opposing witnesses give contradictory testimony, the consequence is that one side will or will not carry its burden of proof as to the effectuation of its "integration" proposal (which would not result in disqualification and would not necessarily result in denial of an application). As held in Evansville Skywave, Inc., 7 FCC Rcd 1699, 1700, para. 14 (1992), the failure of an applicant to prove its "integration" proposal does not imply a finding of deceit.

The FCC and the D.C. Circuit held that Ochoa "should have been on notice that her candor was specifically in issue" (App. 127a, 133a). However, an applicant is not required to guess or to speculate as to what issues are being considered. Radio Athens, Inc. v. FCC, 401 F.2d 398, 404 (D.C. Cir. 1968), "full and explicit notice" by an agency is the "heart of administrative due process." Satellite Broadcasting Co., Inc. v. FCC, 824 F.2d 1, 3-4 (D.C. Cir. 1987), if an agency uses its own interpretation to cut-off an applicant's rights, it must give "full" notice" and not force the applicant to play "Russian Roulette."

Agencies "may not turn the provision of notice into a game of bureaucratic hide and seek." MCI Telecommunications Corp. v. FCC, 57 F.3d 1136, 1142 (D.C. Cir. 1995). Where "opacity" of the FCC's statements renders them susceptible to other meanings, an applicant will not be bound by the FCC's post hoc interpretation. RCA Global Communications, Inc. v. FCC, 758 F.2d 722, 731 (D.C. Cir. 1985).

The record shows that Ochoa was not given such "full and explicit" notice at the hearing by the FCC that it was charging her with disqualifying deceit (App. 8a, 25a, 125a, 141a-151a). The D.C. Circuit acknowledged that Ochoa was given no such actual notice by concluding that she "should have been on notice that her candor was specifically in issue." (App. 133a).

The charge of disqualifying deceit was first raised by the FCC in the Initial Decision, which was after Ochoa concluded her hearing testimony and after the hearing concluded (App. 10a, 25a, 32a-33a). Thus, Ochoa had no opportunity to defend, explain, or clarify her hearing testimony at the time of testifying with respect to charges of disqualifying deceit (App. 141a-151a).

After Ochoa testified, the ALJ said nothing to her about him considering her concluding testimony to contradict her earlier testimony, or that she had admitted or conceded to earlier giving false or misleading testimony or had

willfully concealed material information (App. 141a-145a). However, "due process," as guaranteed by the Fifth Amendment and by the precedent of this Court, requires Ochoa to have been confronted by the ALJ while she was still on the hearing stand and specifically told that he considered her testimony to be disqualifying deceit and that she was charged with this alleged misconduct.

Such confrontation while on the hearing stand, would have given Ochoa the opportunity to explain or to clarify any apparent or perceived inconsistency between her initial and her concluding testimony with respect to charges of disqualifying deceit. In Re Ruffalo, 390 U.S. at 551-552. The FCC's failure to give Ochoa notice at the hearing of the charge of disqualifying deceit, or to confront her at the hearing with such charges, would require that her disqualification be vacated or reversed.

The fact of an applicant taking an oath prior to testifying that he or she will testify truthfully is not notice which is legally sufficient to inform one that the testimony that they have given is considered by the agency to be inconsistent or untruthful and that they are charged with disqualifying deceit (App. 33a). If so, there would never be a need to give an applicant actual notice of charges of deceit against them.

However, the precedent of this Court, of the D.C. Circuit, and of the FCC

requires that specific notice of being charged with disqualifying deceit be fully given to applicants testifying under oath before they complete their testimony. In Re Ruffalo, 390 U.S. at 551-552; West Coast Media v. FCC, 695 F.2d 617, 620 (D.C. Cir. 1982), deceit by an applicant should not be discussed in the absence of a special designated issue; Policy Statement on Comparative Broadcast Hearings, 1 FCC2d at 399, there must be a special designated issue in order to consider evidence of "bad character" or deceit.

The record of this proceeding shows that Ochoa was the victim of a "trial by ambush." This is demonstrated by the failure of the ALJ to ever put Ochoa on notice at the hearing that her truthfulness or "character" was in issue because of the testimony which she had given, or to confront Ochoa at the hearing with charges of disqualifying deceit and allow her to explain her previous testimony with respect to such disqualifying charges (App. 32a-33a, 145a-151a).

Trials are not poker games in which prosecutors can conceal their cards until played. Williams v. Smith, 399 U.S. 78, 82 (1970). As noted in Zauderer v. Office of Disciplinary Counsel, 471 U.S.626, 655, n. 18 (1985), what was "particularly offensive" in In Re Ruffalo was the agency's change of the charges against the petitioner, such that the very evidence put on by the petitioner in defense of the

original charges became inculpatory under the revised charges. Thus, the original charges functioned as a "trap," for they lulled the petitioner into presenting evidence that resulted in disqualification under charges not then made by the agency. Id., 390 U.S. at 551, n. 4.

This same "offensive" and unconstitutional tactic was used by the FCC against Ochoa. It took testimony given by Ochoa to demonstrate her "integration" pledge under the "standard comparative" issue and then after the hearing concluded made it inculpatory for purposes of disqualifying her, without notice to her at the hearing that she was charged with disqualifying deceit based upon her testimony under the "standard comparative issue" (App. 8a, 25a, 32a-33a, 125a, 141a-151a).

Both the FCC and the D.C Circuit relied upon RKO General, Inc. v. FCC, 670 F.2d 215, 231-236 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982), to disqualify Ochoa (App. 58a, 100a, 131a-132a). To the extent that this decision allows a Federal agency to disqualify an applicant without full and explicit notice at the hearing as to charges of disqualifying deceit, it should be overruled as in conflict with the Fifth Amendment and as in conflict with precedent of this Court in In Re Ruffalo, 390 U.S. 544, 551-552, and in In Re Oliver, 330 U.S. 257, 273-278.

RKO General, Inc. v. FCC, 670 F.2d at 235-236, moreover allows summary

disqualification where the petitioner's conduct was committed directly before the agency and where a further trial or hearing would presumably be an unnecessary use of agency resources. However, In Re Oliver, 333 U.S. at 260, n. 2, 274-276, prohibits the use of summary imposition of sanctions, even where the petitioner's misconduct was committed before the court (except where there is an open threat to the order of the court which must be instantly suppressed) and even where another trial would presumably be an idle gesture. Thus, RKO General, Inc. v. FCC, 670 F.2d at 235-236, should be overruled to the extent that it is in conflict with the Fifth Amendment and with precedent of the Court.

Accordingly, it is requested that certiorari be granted. An important question of Federal law is raised which requires resolution by the Court. This question is whether the action of the FCC in sanctioning and disqualifying Ochoa without notice to her at the hearing of the charge of disqualifying deceit is in conflict with fundamental principles of "due process," as required by the Fifth Amendment, and is in conflict with In Re Ruffalo, and with In Re Oliver? Moreover, an important question of Federal law is raised as to whether certain aspects of RKO General, Inc. v. FCC, 670 F.2d 215, 231-236, are in conflict with the Fifth Amendment and with In Re Ruffalo and In Re Oliver, and thus whether RKO should be overruled in this respect?

(b) The petition for writ certiorari raises an important Federal question of law as to whether a Federal agency's reliance upon "inferences" from hearing testimony to find deceit or conflicts in testimony to serve as a basis to impose the sanction of disqualification against an applicant is contrary to Steadman v. SEC, 450 U.S. 91, 101 (1990), which requires use of the "preponderance of [substantial] evidence" standard to impose such sanction?

The petition for writ of certiorari raises an important question of Federal law as to whether the FCC's reliance upon "inferences" from Ochoa's hearing testimony to find deceit by her or conflicts in her testimony to serve as a basis to impose the sanction of disqualification against her is contrary to Steadman v. SEC, 450 U.S. 91, 101 (1981). That precedent requires use of the "preponderance of [substantial] evidence" standard.

As held in Steadman, in order for a Federal agency to impose sanctions, such as disqualification for deceit, it must demonstrate misconduct by a "preponderance of [substantial] evidence," or weight of the evidence, and not by the minimal "substantial evidence" standard. Steadman v. SEC, id. "Substantial evidence" is something less than the weight of the evidence. Consolo v. FMC, 383 U.S. 607,

620 (1966).

The FCC has acknowledged that in disqualifying an applicant for deceit it must demonstrate that it is more likely than not that an applicant engaged in such misconduct. It may not merely "infer" that such misconduct occurred. Silver Star Communications-Albany, Inc., 6 FCC Rcd 6905, 6906, para. 18 (1991). However, in spite of a clear legal mandate from this Court to use the "preponderance of [substantial] evidence" standard to impose the ultimate sanction of disqualification and the FCC's own acknowledgement of that standard, the FCC used the less exacting "substantial evidence" standard to disqualify Ochoa.

The decisions of the FCC are improperly based upon "inferences" from Ochoa's hearing testimony which can only be justified under the less exacting "substantial evidence" standard (App. 132a). As an example, the FCC made the inference from Ochoa's hearing testimony that she had told opposing witnesses of her "commitment" to move to the city of license if she was granted the license (App. 123a, 145a-151a). The FCC also made the inference from Ochoa's hearing testimony at the initial hearing that she told opposing witnesses she would move to the city of license and later "disavowed" this testimony (App. 129a, 145a-151a).

The D.C. Circuit suggests that Ochoa's hearing testimony contains "irremediable" conflicts, which mean

impossible to correct or to repair (App. 131a). Webster's University Dictionary (1984). However, purported conflicts based upon inferences from hearing testimony are by definition simply not irremediable (App. 145a-151a).

Accordingly, certiorari should be granted. An important question of Federal law is raised which requires resolution by the Court. This question is whether the action of the FCC in disqualifying Ochoa based merely on "inferences" from her hearing testimony, to make findings of deceit or to find conflicts in her testimony, is directly contrary with precedent of this Court mandating the use of the "preponderance of [substantial] evidence standard of proof by a Federal agency, and not use of the less exacting "substantial evidence" standard, to impose the ultimate sanction of disqualification against an applicant?

(c) The petition for writ of certiorari raises an important question of Federal law as to whether a disqualified applicant before a Federal agency, who is a minority female, has standing as a "private attorney general" to challenge the grant of a competing applicant in order to raise issues of disparate and discriminatory treatment by the Federal agency, where it improperly favored a white male applicant over the minority female applicant?

The Judgment of the D.C. Circuit denied Ochoa standing to challenge the grant of the application of Foothills. This was because she had been disqualified by the FCC (App. 137-139).

According to the D.C. Circuit, as a disqualified applicant, Ochoa can challenge the grant of the application of Foothills only if the FCC applied disparate standards to their applications with respect to the same conduct arising out of the same factual circumstances. Here, Ochoa and Foothills engaged in similar conduct, but arose from different factual circumstances (App. 137a-139a). The D.C. Circuit's holding was based upon Garden State Broadcasting L.P. v. FCC, 996 F.2d 386, 395 (D.C. Cir. 1993), citing, Jacksonville Broadcasting Corp. v. FCC, 348 F.2d 75, 79 (D.C. Cir. 1965).

However, such an unduly narrow and

constricted holding limiting standing is in conflict with broad principles enunciated by the Court allowing standing. Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982), holds that standing can be shown by a petitioner demonstrating (1) some actual or threatened injury that (2) fairly can be traced to the challenged action and (3) is likely to be redressed by a favorable decision.

Ochoa's application is in competition with the application of Foothills. Thus, she has been injured by the denial of her application and the grant of Foothills' application by the FCC based upon disparate standards and discriminatory treatment.

Whether the FCC applied disparate standards to the same misconduct arising out of the same factual circumstances and engaged in by both parties is not dispositive of the issue of unequal treatment. As recognized by Melody Music, Inc. v. FCC, 345 F.2d 730, 732-733 (D.C. Cir. 1965), the use of disparate legal standards with respect to any aspect of the same proceeding requires that the decision be vacated or reversed.

In its "comparative hearing" proceeding, the FCC engaged in disparate and discriminatory treatment of Ochoa, an Hispanic female, in comparison to Foothills, a competing applicant composed of white males, and thus engaged in racial

and gender discrimination in violation of the Fifth Amendment. The FCC gave more lenient treatment to Foothills, which was found to have made disqualifying misrepresentations with respect to its "integration" proposal. Such disparate and discriminatory treatment is a denial of "due process."

In Initial Decision, 7 FCC Rcd 1861, 1863-1864, 1869, the ALJ disqualified Foothills because it misrepresented the role of one of its principals as to its "integration" proposal. In so doing, the ALJ made credibility findings with respect to the testimony of Foothills' principals and found a logical motive to deceive --- to maximize its "integration" credit --- the same motive that the ALJ found as to Ochoa (App. 18a-24a, 44a-46a).

The disqualification of Foothills was based upon a properly and timely specified issue charging it with misrepresentation. Thus, there is no question that it had notice at the hearing of the charge of deceit (App. 10a).

In Decision, 7 FCC Rcd 6569, 6575, the Review Board reversed the credibility findings by the ALJ and found Foothills qualified. According to the Board, it could find no evidence of deceptive intent or abusive conduct by Foothills. The FCC affirmed this ruling (App. 69a-77a, 81a-82a, 137a).

However, in a conflict between the factual and credibility findings of an ALJ

and that of the Review Board, the FCC owes its deference to the ALJ who actually heard the testimony. Bechtel v. FCC, 957 F.2d 873, 877-878 (D.C. Cir. 1992); Faulkner Radio, Inc. v. FCC, 557 F.2d 866, 870 (D.C. Cir. 1977), credibility resolutions by ALJ's are entitled to great weight on judicial review, unless predicated upon material errors of law.

In the case of Foothills, the ALJ's factual and credibility findings were not contradicted by other record evidence and were not predicated upon a material error of law. The FCC simply choose to ignore the ALJ's findings. This improper action by the FCC was the only way in which it could grant Foothills' application.

In the case of Ochoa, the ALJ's factual and credibility findings were based upon a material error of law. The error of law was the ALJ's failure to give Ochoa notice at the hearing of the charge of disqualifying deceit based upon the testimony that she had given or others had given against her. This error of law was the only way in which the FCC could deny Ochoa's application.

The FCC thereby improperly stigmatized as a "liar" an Hispanic female applicant, with extensive broadcast experience, seeking to be awarded an FM radio broadcast permit in a small and virtually all-white town. The FCC's post hoc characterization of Ochoa as a "liar" resulted from her pledge at the hearing to move to Lenoir, the city of license, with

her husband and children.

Thus, the FCC violated fundamental "due process" rights of Ochoa. It engaged in racial and gender discrimination by improperly favoring an applicant composed of local white males over an out-of-town Hispanic female.

The D.C. Circuit arbitrarily cut-off Ochoa's right to raise these "due process" issues of disparate and discriminatory treatment based upon a narrow and hypertechnical view of standing. Moreover, the D.C. Circuit ignored its long-established precedent allowing standing by a "disappointed" applicant to act as a "private attorney general" in order to prevent the granting of an application through improper or "illegal" agency action. National Federation of Federal Employees v. Cheney, 883 F.2d 1038, 1052 (D.C. Cir. 1989).

Nothing could be more improper or "illegal" by a Federal agency than to engage in racial and gender discrimination. "Disappointed" applicants acting as "private attorney generals" can be an effective instrument to expose and prevent improper or illegal actions by Federal agencies.

Accordingly, certiorari should be granted. An important question of Federal law is raised which requires resolution by this Court. This question is whether a disqualified applicant before the FCC, who is a Hispanic female, has standing as a

"private attorney general" to raise issues of disparate and discriminatory treatment by the FCC, where it improperly favored an applicant composed of white males over her application? Moreover, the question is raised as to whether Garden State Broadcasting L.P. v. FCC, 996 F.2d 386, 395, should be overruled to the extent it unduly limits standing by applicants to challenge improper or illegal FCC actions?

## CONCLUSIONS

WHEREFORE, in view of the foregoing, the Court is urged to grant Ochoa's petition for certiorari and review this case because of conflicts with the "due process" clause of the Fifth Amendment and conflicts with precedent of this Court. Moreover, this case raises an important Federal issue as to standing by a "private attorney general" to challenge Federal agency actions, which requires consistent application by the Federal courts.

Respectfully submitted,

MARIA M. OCHOA

By:_____

Stephen T. Yelverton, Esq.
Counsel of Record
Yelverton Law Firm, P.C.
1101 30th St., N.W.,
Suite 500
Washington, D.C. 20007
Tel. 202-625-4321

(2)
Supreme Court, U.S.
FILED
961358 FEB 25 1997
OFFICE OF THE CLERK

Case No. _____

*IN THE*
*SUPREME COURT OF THE UNITED STATES*
*OCTOBER TERM 1996*

---

*MARIA M. OCHOA,*
*Petitioner*

*v.*

*FEDERAL COMMUNICATIONS COMMISSION and*
*the UNITED STATES OF AMERICA,*
*Respondents*

---

*On Petition for Writ of Certiorari*
*to the United States Court of Appeals*
*for the District of Columbia Circuit*

---

# *PETITION FOR WRIT OF CERTIORARI*

---

## *APPENDIX*

---

*Stephen T. Yelverton, Esq.*
*Counsel of Record*
*Yelverton Law Firm, P.C.*
*1101 30th St., N.W.,*
*Suite 500*
*Washington, D.C. 20007*
*Tel. 202-625-4321*

154pp

TABLE OF CONTENTS

Page

APPENDIX A
Hearing Designation Order,
5 FCC Rcd 7079 (MMB 1990) . . . . . 1a

APPENDIX B
Memorandum Opinion and Order,
FCC 91M-1475, rel.
April 26, 1991 . . . . . 8a

APPENDIX C
Initial Decision, 7 FCC Rcd
1861 (ALJ 1992) . . . . . 10a

APPENDIX D
Decision, 7 FCC Rcd 6569
(Rev. Bd. 1992) . . . . . 51a

APPENDIX E
Memorandum Opinion and Order,
8 FCC Rcd 3135 (1993) . . . . . 81a

APPENDIX F
Memorandum Opinion and Order,
9 FCC Rcd 56 (1993) . . . . . 93a

APPENDIX G
Order, 10 FCC Rcd 142 (1995) . . . 118a

APPENDIX H
Order, 10 FCC Rcd 8746 (1995) . . 120a

Page

APPENDIX I
Judgment, U.S. Court of Appeals, D.C. Circuit, filed September 23, 1996 . . . . . 121a

APPENDIX J
Order, U.S. Court of Appeals, D.C. Circuit, filed November 27, 1996 . . . . 140a

APPENDIX K
Portions of Hearing Transcript . . 141a

APPENDIX A, HEARING DESIGNATION ORDER, MM Docket No. 90-430, rel. Nov. 20, 1990, 5 FCC Rcd 7079 (MMB 1990)

In re Applications of:

MARIA M. OCHOA
File No. BPH-890615ME

FOOTHILLS BROADCASTING, INC.
File No. BPH-890616MR

For Construction Permit for a New FM Station on Channel 277A, in Lenoir, North Carolina

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Goodale. The Report and Order in MM Docket 84-750, 50 Fed. Reg. 19,936 (1985) established a strict processing system for applications for construction permits on nonreserved FM broadcast channels. To be considered substantially complete or "tenderable", applications must meet precise tenderability standards set forth in Appendix D of the Report and Order. One critical element of tenderability is correct transmitter location coordinates./1 Goodale's application indicates that the location of its transmitter is 35 deg. 58' 40" N.L.. 81 deg. 34' 27" W.L. However, the FCC's engineering study, based on the topographic map submitted by Goodale, indicates that the coordinates shown on the map are 35 deg. 58' 40" N.L.. 81 deg. 34' 43" W.L. This discrepancy cannot be

resolved confidently and reliably within the confines of the application: thus, the presence of the incorrect data will be treated as functionally equivalent to its absence in accordance with the procedure set forth in Appendix D.

3. Applications accepted for tender, but that are ultimately shown to be untenderable will be "returned as inadvertently accepted for tender and, if resubmitted, will not be accepted nunc pro tunc. Return of the application will void the application reference number inadvertently assigned and whatever rights of tender might have been associated with it." Id. Accordingly, due to the inconsistency in its transmitter location coordinates, Goodale's application will be returned as inadvertently accepted for tender. Steven B. Courts, 4 FCC Rcd 4764 (1989).

4. The applicants below have petitioned for leave to amend their application on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

| APPLICANTS | AMENDMENTS FILED |
|---|---|
| Ochoa | November 3, 1989; June 15, 1990 |
| Mystic | December 11, 1989: January 22, 1990 |

5. On May 4, 1990, Ochoa filed a Petition To Deny Or Dismiss Furniture City's application. Ochoa states that Furniture City's contour map does not clearly and legibly define the city boundaries of Lenoir, North Carolina. It is not clear, Ochoa claims, that the community of license is fully encompassed by the 70 dBu contour. Ochoa alleges that Furniture City's original application shows an arrow pointing to a "darkened smudge" purporting to represent the city of Lenoir. Therefore, Ochoa concludes, Furniture City's application should be dismissed, having been inadvertently accepted for tender.

6. We will deny Ochoa's petition. Ochoa relies upon Karen S. Klehamer, 5 FCC Rcd 2554 (1990), which states,inter alia, that applications whose contour maps are without the boundaries of the city of license clearly indicated, or without a point on the map indicated as the city of license clearly within the 70 dBu contour, cannot be accepted for tender. In this case, Furniture City's contour map indicates Lenoir as a shaded area clearly within the 70 dBu contour. Accordingly, Ochoa's Petition To Deny will be denied below.

7. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Sundown has not completed Item 4 correctly. Sundown's application gives a post office box number as the residence address for Muriel D. Payne, Billy Jack Morgan, and Rebecca Pons

Morgan. Accordingly, Sundown must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

8. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Foothills have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Foothills would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

9. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301 and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Bowman and Lingafelt have filed such statements, they are deficient. Bowman has not listed an acceptable recruitment source for African Americans, and Lingafelt has not listed specific recruitment sources for either African Americans nor women. Accordingly, Bowman will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

10. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as

proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

11. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Foothills would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

12. IT IS FURTHER ORDERED That pursuant to the discussion in paragraphs 2 and 3, supra, Goodale's application is HEREBY RETURNED as inadvertently accepted for tender.

13. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Ochoa and Mystic ARE GRANTED. and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

14. IT IS FURTHER ORDERED, That Ochoa's May 4 1990 Petition to Deny or Dismiss Furniture City's application IS DENIED.

15. IT IS FURTHER ORDERED, That Sundown shall submit an amendment which contains the information required by Section II,

Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

16. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Bowman and Lingafelt shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

17. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

18. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

19. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be

heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commissions Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

20. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FOOTNOTE

/1 The geographic coordinates, to the nearest second, of the proposed transmitter site are critical to processing an application. Inconsistent data make it impossible to determine the veracity of the site availability certification, the environmental impact statement, or the information supplied for FAA approval. In other cases, absence of these data makes it impossible to determine the distance from the proposed site to other proposed or existing broadcast facilities and to the community of license. In the commercial FM service, spacing determines the acceptability of an application where mutual exclusivity exists with respect to a given allocation (47 C.F.R. 73.207).

APPENDIX B, MEMORANDUM OPINION AND ORDER, FCC 91M-1475, rel. April 26, 1991 (ALJ)

1. Maria M. Ochoa has asked the Trial Judge to issue a subpoena for Vanessa Keys. Ochoa filed her request on April 24, 1991, and represents that Keys will surrebut the rebuttal testimony of Susan Litaker, a prospective witness for Foothills Broadcasting, Inc.

2. The Trial Judge will not grant Ochoa's request. At the March 19-20 hearing sessions the Trial Judge granted the right of rebuttal on a narrow comparative point: namely, whether Ochoa really intends to move to Lenoir, N.C., (if her application is granted) and manage her FM proposal. 1/ 2/.

3. Since that time what was a narrow comparative point requiring a limited amount of testimony, has turned into a Cecil B. DeMille production that promises to feature nine witnesses plus documents. To start permitting surrebuttal could well result in a waste of limited but valuable trial time.

4. Now Ochoa wants to start scheduling surrebuttal witnesses, even before the rebuttal witnesses have testified. But she hasn't shown that the limited matters Vanessa Keys would offer can't be adduced through one of the other nine witnesses, or that the surrebutter's (Ms. Keys) testimony is an essential plank in Ochoa's version of the facts.

5. SO, the Request for Subpoena that Maria Ochoa submitted on April 24, 1991, IS DENIED.

ALJ Walter C. Miller

1/This ruling is being issued pursuant to 47 C.F.R. 1.335.

2/The Trial Judge has always been loathe to allow rebuttal sessions. They usually lead to the adduction of evidence which is of tangential relevance at best. He allowed limited rebuttal here because he was faced with a one-on-one; i.e., Maria Ochoa and Reta Thorn giving contradictory testimony.

APPENDIX C, INITIAL DECISION, FCC 92D-19, rel. March 9, 1992, MM Docket No. 90-430, 7 FCC Rcd 1861 (ALJ 1992)

1. Initially eight applicants sought authority to operate a new FM station on Channel 277A in Lenoir, North Carolina. See 55 F.R. 50398 published December 6, 1990./1 Three remain: Maria M. Ochoa (Ochoa), Gateway Media Limited Partnership (Gateway) and Foothills Broadcasting, Inc. (Foothills).

2. After a lengthy and intermittent interlocutory cycle, we took evidence/2 on the following issues:/3

1: To determine whether Gateway is financially qualified to construct and operate its proposed station and whether it was so qualified on June 15, 1989, to the date the application certified to its financial qualifications;/4

2: To determine whether Foothills lacked candor or misrepresented the facts regarding its ownership structure when they filed BPH-890616MP, and, if so, whether Foothills is of fit character to be an FCC licensee;/5

3: To determine whether Foothills' two tier (voting and non-voting) ownership structure is a "sham," and if so what impact that has on their qualifications to be an FCC licensee;/5

4: To determine which of the proposals would, on a comparative basis, best serve the public interest; and

5: To determine, in light of the evidence pursuant to the specified issues, which of the applications should be granted, if any.

Both the burden of proof and the burden of proceeding on Issue 1 was placed on Gateway Media Limited Partnership. On Issues 2 and 3, the burden of proceeding was placed on Maria M. Ochoa, while the burden of proof remained on Foothills.

3. We held the Prehearing Conference on March 1, 1991, and the Evidentiary Admission Session on March 8, 1991. Hearings were held on March 19 and 20, May 1, 2, and 20, and September 26, 1991. The evidentiary record was closed on September 26, 1991.

4. The three applicants filed their first set of Proposed Findings of Fact and Conclusions of Law on July 5, 1991, and their first set of Reply Findings on July 19, 1991. They filed their second set of Proposed Findings on November 27, 1991, and their second set of Reply Findings on December 13, 1991.

Findings of Fact

Issue 1: Gateway Financial Issue

5. Under Issue 1 we must determine whether Gateway was financially qualified on June 15, 1989, at the time they certified they were. It was General Partner Susan Rowe, with 50% equity and 100% voting interests, who so certified.

6. Before Gateway filed its application, Susan Rowe estimated the cost to construct and operate the proposed station, added an "approximate buffer" to her estimates and decided to ask the bank for a $425,000 loan.

7. On May 31, 1989, Gateway's counsel telecopied a sample bank letter to Rowe. The sample letter stated in part: (a) the bank's "willingness to lend" the applicant

a sum to be inserted by the bank; (b) an interest rate of "one to two percent above the prime rate; (c) that the loan would be "repayable over a period of four to six years;" (d) that the loan was subject to final review of the applicant's projection and a complete loan package supported by financial statements after grant of the application; and (e) that the loan would be subject to the bank's "customary covenants, terms, and conditions." Gateway Ex. 14, Att. B, p. 2.

8. So about two weeks before she certified Susan Rowe had a sample bank letter to give to a financial institution. But Rowe didn't go to a financial institution. Instead, she contacted a neighbor of hers, Al Wood. He was a branch manager of First Union Bank in Lenoir. She told Woods about her plans. She told him she was interested in a $425,000 loan, she gave him the sample letter, and said she wanted a letter like the sample. The only document she gave Wood was the sample letter.

9. Wood said that he couldn't authorize commercial loans but that he would turn the matter over to Stephen McCord, First Union's Commercial Banking Manager for Lenoir. Wood never met with McCord about Gateway's request for a loan letter. Instead, he telephoned McCord and sent him the letter. Wood and McCord had one or two brief conversations. Wood told McCord that Rowe wanted to obtain a radio station and needed a letter stating the bank's "interest" in providing funds. Foothills Ex. 6, p. 8.

10. At the time he was considering Gateway's request for a loan letter McCord had never met Rowe, and he had no meetings or telephone conversations with her during the time he was considering and responding to Gateway's request. Foothills' Ph. II, Ex. 6, p. 5.

11. Susan Rowe has testified differently. At the March 19, 1991 hearing session, she testified at some length concerning meeting at the bank with McCord before Gateway received its loan letter. (Tr. 182-188). She said that they had talked about an interest rate "spread over prime;" that she told him Gateway would need "X" dollars; that she asked him to prepare a bank letter; and that McCord had asked her if her husband would back her in the project and that she had replied that he would. (Tr. 182, 183, 186-188).

12. However, a short time later, when she was deposed on April 9, 1991, she first testified that she had not met with McCord to talk about a letter. Then she said that she may have talked to McCord, but didn't remember the conversation. Foothills Ph. II Ex. 7, pp 6 and 19. Thus we have Ms. Rowe giving three different versions of events.

13. On June 6, 1989, McCord wrote two letters for Gateway. In the first letter, he referred to the bank's "willingness to consider a loan request." After he wrote this first letter he had a telephone conversation with Gateway communications counsel (see para. 7 supra.) They talked about the language in the letter. McCord then wrote a second letter also dated

June 6, 1989. This referred to the bank's "willingness to lend" Gateway money.

14. The first letter also contained this sentence: "This letter should not be construed as a commitment to lend." The comparable sentence in the second letter reads: "any commitment to lend is expressly subject to the borrowing entity meeting all terms, conditions and covenants the bank may deem appropriate." McCord says, that in his mind, those changes in the letter didn't effect its substantive meaning at all.

15. During his telephone conversation with Gateway's counsel (see Finding 13 supra.), McCord discussed possible interest rates and repayment terms. But McCord refused to include such terms in his second letter; he was "uncomfortable" including those terms in the letter without having seen "the total deal"; and because he hadn't seen a lot of detailed information that he expected to get in the future. Neither of the McCord's letters contained any language about security for the proposed loan. When he agreed to write the letters, McCord was mistakenly assuming that Rowe's husband, Bill White and Hoffman's husband Eric would be involved in Gateway. Foothills Ph. III Ex. 6, p. 5.

16. Gateway admits that before they filed their application, they didn't provide First Union with any documents describing their financial plans for construction and operation of the station or with financial statements for the application or its principals.

17. Gateway filed its application in

this proceeding on June 16, 1989. There Susan Rowe (who really had nothing to do with the terms of the two McCord letters) certified to Gateway's finances. She swore that Gateway had "sufficient net liquid assets on hand and that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue." In so doing she was relying on the second bank letter. Gateway did not rely on the availability of money from other sources.

18. Since Susan Rowe hadn't talked with McCord, she didn't know that there were a great many impediments to Gateway's obtaining a $425,000 loan. See Finding 6 supra. For example, she didn't know that it is First Union's standard practice to require borrowers to provide equity contributions equal to 25% of the real estate value and 20 to 25% of the value of equipment to be purchased with the loan proceeds; she didn't know that First Union doesn't make long term loans for working capital; she didn't know that before First Union will make a commercial loan, they conduct a study of the potential cash flow of the business to determine if it is likely to generate adequate funds for repayment; and she didn't know that McCord didn't have the authority to approve a $425,000 loan.

19. Under Aspen FM, Inc., FCC 90R-37 released May 23 1990 at paras. 15-17 and Shawn Phalen, FCC 90R-64, released July 24, 1990, Gateway must also prove they are presently financially qualified.

20. On January 10, 1991, Foothills

moved to enlarge the issues against Gateway. That motion was granted. See Footnote 4 supra. At that time McCord prepared still another letter for Gateway. This letter, dated January 18, 1991 contained the items missing from the June 6, 1989 letter. There is a specific interest rate (1.5% above prime) a repayment period (beginning 30 days after the loan is issued, and not to exceed seven years),and guarantee and collateral requirements (the stations assets and personal guarantees).

21. Most importantly, Mrs. Rowe's husband, Mr. William White, III, has now personally guaranteed (in writing) a loan from First Union to Gateway to construct and operate the proposed station. See Findings 11 and 15, White is a Vice-President of Greer Laboratories Inc. Greer is a family owned and operated pharmaceutical manufacturer in Lenoir. They specialize in producing allergenic extracts. First Union has long had financial dealings with Greer and is familiar with Mr. White's personal financial status. However, a prenuptial agreement governs White's and Rowe's marriage. So White's personal written guarantee becomes significant.

22. Intermediate Financial Findings. Based on the foregoing (Findings 19-21 supra.) a further finding is warranted that Gateway is presently financially qualified. They have shown that they now have sufficient net liquid assets available from a committed source to construct and operate the requested facilities for there months without

revenues. The First Union January 18, 1991 loan commitment letter buttressed by William White's personal guarantee provides the forward looking assurance.

23. But, under Aspen FM, Inc. and Shawn Phalen, Gateway has a forward-backward obligation. They must demonstrate that they were financially qualified on June 15, 1989 when they certified they were. See Finding 5. based on the foregoing, the finding is warranted that it wasn't financially qualified on June 15, 1989, when Rowe certified they were.

24. On June 15, 1989, Gateway did not have sufficient net liquid assets on hand. Rowe knew that at the time she was certifying. Nor, on that date, did Gateway have sufficient funds available from committed sources to construct and operate the requested facilities for three months without revenue. Rowe knew that too, or should have known it.

25. Ms. Rowe had never met Stephen McCord of First Union, the person her neighbor, Al Wood, had selected to provide Gateway with a loan commitment letter. She knew she needed $425,000, but she didn't know if this Stephen McCord was authorized to approve a loan in that amount (see Findings 6 and 18 supra.). Since she had never personally dealt with either McCord or First Union, Rowe knew that Gateway had never provided First Union with the background financial documents McCord would need to draft a meaningful loan commitment letter.

26. Moreover, had Susan Rowe compared the sample loan letter her communications counsel had given her with McCord's second

June 6, 1989 letter, she would have readily seen the McCord letter for what it was - a mere accommodation, and not a very good one at that.

27. So, just as surely as Gateway is financially qualified now, Gateway wasn't financially qualified on June 15, 1989, when the sole General Partner, Susan Rowe certified that they were. So Issue 1 is decided adversely to Gateway, and Gateway is not qualified to be a Commission licensee.

Issues 2-3: Foothills' Sham and Misrepresentation Issues

28. Foothills filed its Lenoir application on June 16, 1989. There they represented to the Commission, their opponents (see Footnote 1, and Finding 1 supra.), and the public that they were a North Carolina two-tier stock corporation (common voting and common non-voting). The following chart shows the details (Foothills Ex. 1):

| Stockholder | Voting Shares(%) | Non-voting Shares(%) |
|---|---|---|
| John B. Beall | 900 (82%) | 0 (0%) |
| Steven Frank | 200 (18%) | 0 (0%) |
| W. Wallace Respess | 0 (0%) | 900 (100%) |

Percentage of Equity

Beall 45%; Frank 10%; Respess 45%

29. John Beall is ostensibly the President, Treasurer and a Director of Foothills; Steven Frank is Vice-President, Secretary and a Director; and Respess claims to be neither an officer nor Director, nor a voting stockholder.

30. Foothills' formational problems are legion. To start with, although the chart (para. 28. supra.) shows Steven Frank holding 200 shares of voting stock, Foothills' application says he holds 900 shares of voting stock. This discrepancy has never been corrected.

31. Foothills never signed or cannot find fully-executed copies of several important corporate documents. This includes stock subscription agreements,/6 annual meeting minutes, and federal business filings.

32. Foothills never amended its application to accurately reflect a change in Mr. Respess'address. Such formational documents that Foothills has produced clearly evidence backdating to the time the application was filed; i.e., they demonstrate that Foothills was not a legal corporate entity on June 16, 1989 (the filing date).

33. Foothills was unable to produce a fully-executed site agreement letter, and they never paid the proposed site owner the option fee required by the site contract until 2 or 3 weeks before the hearing began. Foothills claims to have held an annual corporate meeting in 1990. But no corporate minutes for that meeting were ever produced (Tr. 278, 323-324)./7

34. Even the documents Foothills have

been able to produce do little to explain their formational problems. Foothills' Articles of Incorporation are dated June 15, 1989. But the stock certificates for Foothills' three owners are dated June 14, 1991 (2 years later). Foothills' organizational meeting's minutes say the meeting was held on June 15, 1989, but those same meeting were executed the previous day, June 14, 1989.

35. While Foothills represents itself as existing on June 16, 1989, that is not consistent with the stockholders'checks for their initial stock purchases. Respess' check is dated June 16, 1989; Beall's is dated June 19, 1989; and Frank's is dated July 3, 1989.

36. Nowhere is the evidence of backdating (see Finding 32 supra.) clearer than is displayed in a legal bill Foothills received for its corporate organizational formulation. Respess, an alleged passive non-voting stockholder (45% equity), is also an attorney-at-law. He is a partner, and a 40% owner of Todd, Vanderbloemen, Respess and Brady, a law firm in Lenoir, North Carolina.

37. It was Respess who retained his own law firm to be Foothills' corporate counsel. On October 2, 1989, Respess' firm forwarded a bill for services rendered to Foothills. That bill shows that Respess' partner, Bruce Vanderbloemen, performed a series of corporate organizational acts for Foothills on September 12, 1989 - about three months after Foothills represented that it was a corporation en esse.

38. On September 12, 1989,

Vanderbloemen held an organizational conference with Beall, Frank, and Respess; he completed and issued the stock certificates; he prepared the Initial Franchise Tax Return and forwarded it to Raleigh; he completed the organizational meeting minutes; and he completed other corporate documents./8 39. John Beall agrees that the September 12, 1989 date is accurate; the local register of deeds' date-stamp of September 28, 1989 on the Articles of Preparation is consistent with Vanderbloemen's bill; Beall has noted on the legal bill that he paid it on October 20, 1989; the tendered check is dated October 1989, not June 1989; and Vanderbloemen sent Foothills a memorandum on September 29, 1989 regarding the availability of the corporate name.

40. In addition to the legal services his law firm has performed, and although an ostensibly non-voting, passive stockholder, Respess has been anything but passive. He has actively participated in the prosecution of Foothills' application.

41. He recruited a rebuttal witness to Maria Ochoa's case, Jake Gurley. He talked with Gurley on the telephone, drafted an affidavit for Gurley's signature, and directed Steven Frank (a voting stockholder) to go to Charlotte, North Carolina and get Mr. Gurley's signature on an affidavit.

42. Respess was also instrumental in recruiting another Ochoa rebuttal witness, Mrs. Reta Thorn. He first tried to get Mrs. Thorn to sign a written statement;

she refused. So he secured her testimony by arranging for her to be served a subpoena ad testificandum. Respess personally paid the airfare for Gurley, Thorn, and a third person to come to Washington, D.C. and testify.

43. Respess also initiated and handled settlement negotiations for Foothills. He has handled several such negotiations. In fact, at the scheduled February 5, 1991 settlement conference, Respess was Foothills' chief spokesman and negotiator. He not only did most of the talking he was oblivious as to whether Steven Frank (Finding 41 supra.) was even present during all the meeting.

44. Respess has performed other prosecutorial activities on Foothills' behalf. He has sent application materials to Foothills' FCC counsel; and he confers regularly with Beall, Frank and FCC counsel. When important matters come up, Beall immediately contacts Respess for his advice; Beall only secondarily confers with Steven Frank. Beall received a copy of his deposition transcript directly from Respess. Either Respess or his law firm has directly turned over Foothills' documents to Foothills' FCC counsel without Beall's knowledge.

45. Intermediate Findings. Based on the foregoing (Findings 28-44 supra.), certain intermediate facts are warranted. First, Foothills' two tier (voting and non-voting) ownership structure is certainly and surely a sham. Foothills has represented that its two tier corporation legally existed on June 16, 1989 when they filed their application. It didn't. The

corporation didn't come into being, if it came into being, until some three months later, on September 12, 1989, at the earliest (see Findings 38-39 supra.).

46. Foothills' principals were well aware that their corporate structure was a sham. The record contains evidence of backdating documents to make it appear that the corporation existed on the date the application was filed. See Findings 32, 34-39, supra.

47. Moreover, the argument can be made that Foothills has never established itself as a bona fide corporate applicant. The FM application contains discrepancies that have never been corrected. Foothills' principals never signed or cannot find fully executed copies of vital corporate documents. This includes stock subscription agreements, annual meeting minutes, and Federal business filings. Findings 30-33, supra.

48. Foothills has been representing and continues to represent that Wallace Respess (45% equity) is a non-voting, passive investor. See Finding 28 supra That's a blatant and overt misrepresentation. Respess has been anything but passive. Actually the record supports a contrary inference; i.e., that the Lenoir FM venture is Respess' venture, that he is the moving and driving force behind the Foothills application, and that Beall and Frank follow his guidance.

49. In sum, Foothills' two tier (voting and non-voting) ownership structure was a sham on June 16, 1989 when it was filed.

It remains a sham. Moreover, Foothills knowingly misrepresented the facts about its ownership structure when they filed BPH-890616MP. Issues 2 and 3 will be decided adversely to Foothills.

Issue 4 The Standard Comparative Issue
Description Of The Applicants

50. Maria Ochoa. Ochoa is an individual applicant. She will be the 100% controlling party and owner of the Lenoir FM application. No other person or entity has any understanding or agreement to acquire any ownership or controlling interest in her proposed station.

51. Gateway. Gateway Media Limited Partnership, organized and existing under N.C.law has the follow structure: Susan L. Rowe, General Partner, 50% equity; Margaret W. Hoffman, Limited Partner, 50% equity.

52. Ms. Rowe controls 100% of the applicant. No other person or entity has any understanding or agreement to acquire any ownership interest in Gateway's FM proposal.

53. Foothill's Broadcasting, Inc. The Foothills' ownership structure is set out at Findings 28-29 supra. and will not be repeated here./9 Ostensibly they have two voting shareholders: Beall has 900 shares of voting stock (82%) with a 45% equity; and Frank 200 shares (18%) with a 10% equity. The other stockholder, Respess is ostensibly a non-voting stockholder holding 900 shares of non-voting stock and a 45% equity.

## Diversification of Mass Media

54. Ochoa has no media interests. Neither Gateway or its partners have any interest in any medium of mass communications. Neither Foothill's nor any of its principals have any interest in or association with existing media.

## Best Practicable Service

### Ochoa's Effectuation Problem

55. Both Foothills and Maria Ochoa face serious integration effectuation problems. The sham aspects of Foothills proposal have already been covered under Basic Qualifying Issues 2 and 3. See Findings 28-49 supra. But since no sham issue has been designated against Ochoa, and since none of her opponents have even requested such an issue against her, her effectuation problem becomes relevant to the standard comparative issue, and will be considered under that issue. Maria Ochoa claims 100% quantitative integration based on her sole proprietorship. Before we set out the details supporting that claim, we must address a serious and substantial attack Ochoa's opponents have levied at her integration claim. In essence, her opponents claim that she never intended to carry out her integration pledge.

56. When she filed her FM application on June 15, 1989, Ochoa was general sales manager of Station WMXC-FM, Charlotte. She pledged to divest this interest and sever all connections with WMXC before

commencement of program test authority for the Lenoir station. In her direct case exhibit, she also claimed that she would move to Lenoir if her application was granted, and therefore claimed a preference for future local residence.

57. At a hearing session held on March 19, 1991, Ochoa said that she had told Jake Gurley, her immediate supervisor at WMXC that she was filing for Lenoir, and that she proposed to move to Lenoir and sever her connection with WMXC if her application were granted. She also testified that she told her coworkers, as well as the executive vice president and president of the licensee of WMXC, Allan Box, the same things (Tr. 80-82, 103).

58. Ochoa terminated her WMXC employment on January 22, 1991. Gurley was her supervisor until about the last 90 days of her employment. On October 15, 1990, about 90 days before Ochoa left the company, a new General Manager Reta Thorn replaced Gurley. At the March 19, 1991 hearing session Ochoa said that she had talked with Thorn about her Lenoir application and had told Thorn that she (Ochoa) intended to leave WMXC if the application was granted.

59. Also, on March 19, 1991, Ms. Ochoa was asked if she had investigated any opportunities to acquire other media interests. She said she had not. Then she was asked if she had any discussions with anyone about having an ownership interest in any other media. She said she had not (Tr. 108-109).

60. Then she was asked if she specifically recalled talking with Jake

Gurley in the summer of 1990 about becoming a stockholder in a group he was forming to purchase WMXC and two other stations that E-Z owned. She did remember that (Tr. 109), but she said the group's offer "never came to be, because it was rejected," and she didn't take her potential participation seriously because "...it was all very speculative." However, she did admit during her discussions with Gurley she told him that if the group was able to purchase WMXC and the two other stations, she would continue to work at WMXC after the purchase. On the other hand, she says that during those discussions her then pending Lenoir application or her intention to move to Lenoir were never mentioned.

61. During her initial appearance on March 19, 1991, Ochoa denied ever telling Gurley she had no intention of moving to Lenoir (Tr. 113); she denied telling Gurley that she planned to dismiss her application for a settlement payment (Tr. 113); she denied telling Gurley she thought that her status as a female and minority would make her chances of winning so strong the other competing applicants would pay her to dismiss her application (Tr. 113); and she denied ever telling Gurley that in the unlikely event her application was granted she would sell the station (Tr. 113-114).

62. Ms. Ochoa was then shown a sworn statement of Mr. Gurley's where he averred that she had told him these things. She unequivocally denied ever having given Gurley the information set out in para. 61 supra.(Foothills Ex. 7; Tr. 116-117).

63. She also denied having told Gurley that she would continue to work at WMXC as part of the group proposing to buy the station and two other stations (Tr. 117). But a short time later she conceded that she had agreed (albeit on a very speculative basis) to go into business with Gurley if he bought WMXC (Tr. 120).

64. Faced with the directly contradictory record; i.e., Gurley-Ochoa inconsistent statements, the Trial Judge permitted rebuttal. He did not want either the Review Board or the Commission to be faced with resolving a "one-on-one" situation (Tr. 241-243; 433-436).

65. Reta Thorn, the WMXC General Manager during Ochoa's final days at the station, testified. She (Thorn) stated that she had the occasion to ask Ochoa if she intended to leave WMXC and move to Lenoir to work at the new station if her application was granted (Tr. 359).

66. According to Thorn, Ochoa told her that she did not intend to leave WMXC if her Lenoir application was granted, but would continue to live in Charlotte and work at WMXC indefinitely (Tr. 360- 361, 372-373). Ochoa told Thorn that she didn't intend to obtain the Lenoir station, that she was not going to go that far, and that if her application was granted she would sell the station (Tr. 361, 372, 377-388). Thorn says she believed Ochoa never intended to prosecute the application to a grant.

67. Edward R. Jablonski aka Johnny Jacobs testified at the May 1-2, 1991

rebuttal sessions. Jablonski, WMXC's local sales manager from October 1989 to the present, stated that Ochoa had been his superior until she left the station (Tr. 600-601). He says that in late 1989, he had a conversation with Ochoa about her Lenoir application. He says that during that conversation Ochoa indicated that she did not intend to leave WMXC if her Lenoir application were granted, that she had no desire to move to Lenoir, and that she did not intend to do so. She also told Jablonski that she intended to settle the Lenoir proceeding in return for a payment (Tr. 603-604, 606).

68. Jablonski also says that on another occasion Ms. Ochoa told him that she intended to go to hearing on the Lenoir application, but that her long-term goal was to be WMXC's general manager (Tr. 605-606).

69. Susan Litaker, WMXC's Business Manager since November 1989, also testified at the rebuttal hearing. Litaker says that on one occasion, and in Jake Gurley's presence, she asked Maria Ochoa why she wanted a station in Lenoir when she had a good job in Charlotte. Litaker says that Ochoa replied that she didn't want to run the Lenoir station, she merely wanted to file the application and sell it (Tr. 741-744).

70. Ms. Litaker says she mentioned the Lenoir application to Ochoa on other occasions. According to Litaker, in one of these conversations Ochoa said she had no intention of constructing a station in Lenoir; in another conversation she said that she had no intention of moving to

Lenoir (Tr. 744-748, 752).

71. About a month after Thorn became WMXC's general manager, she came to Litaker. She asked Litaker whether Ochoa intended to leave WMXC and go to Lenoir. Litaker thought Ochoa had told the truth when she told her (Thorn) that she (Ochoa) planned to stay at WMXC. Litaker told Thorn that what Ochoa had told her (Thorn) was consistent with what she told Litaker (Tr. 760-762).

72. Jake Gurley (see Findings 57-62 supra.) testified at the rebuttal. He confirmed the averments he had previously made in his declaration. He was WMXC's General Manager from 1987 until September of 1990. He originally hired Ochoa for a sales person position. Later he promoted her to local sales manager. He says Ochoa told him that she had filed the Lenoir application shortly after it was filed, but she assured him that she did not plan to leave WMXC. Rather, Ochoa said she planned to dismiss her application in return for a settlement (Tr. 653-654).

73. At the rebuttal session, Ochoa presented the testimony of Sylvia Pinson, a Lenoir real estate person. Pinson says that in May and June 1989 she helped Ochoa locate a transmitter site. She also drove the Ochoa's through certain areas of Lenoir to show them houses. But they didn't go into any of the houses. Ochoa told her that if she received a grant, the Ochoa's would move to Lenoir./10

74. Ochoa's husband, David, also testified. He says that to the best of his knowledge Maria intended to move to Lenoir and run her proposed station if her

application was granted (Tr. 909). He says that he doesn't believe his wife said any of the things described in Gurley's statement (see Foothills Ex. 7, and Findings 60-61 supra.). He even believes that Thorn, Jablonski, Gurley and Litaker all lied in their testimony about Ochoa's statements to them that she did not intend to construct the station or move to Lenoir (Tr. 909-911). However, he was unable to provide a convincing rationale for his belief (Tr. 910-914).

75. At her counsel's request Ochoa remained in the hearing room while Jablonski, Litaker, and Gurley testified (Tr. 594-596, 782). She was also permitted to testify again at the conclusion of the rebuttal session. During the course of this later testimony she substantially changed and revised much of the testimony she had given at the March 19, hearing session. She said that when she talked to Gurley and Thorn about her Lenoir application she deliberately cast all her statements in the negative. She told them that the process would be long, the case might be settled, and that there were a number of applicants. She said she did this because she wanted to protect her job at WMXC, and she wanted to show them that she was going to be a "long term player" at the station (Tr. 970-971, 989, 1000). She now concedes that she probably misled Gurley, Thorn, Litaker, and Jablonski about her intentions regarding the Lenoir station and staying at WMXC because she wanted them to believe that she intended to stay at WMXC (Tr. 1001-1002).

76. Intermediate Facts. First, Maria Ochoa has failed to meet her burden of proof. She has failed to persuasively demonstrate that she will move from Charlotte to Lenoir if her application is granted. She hasn't shown her integration pledge to be bona fide.

77. At the time she filed her application she had no intention of moving to Lenoir. From the outset she has believed that her minority and female status would make her chances of winning so strong that her opponents would pay her handsomely to dismiss her application. She has even gone so far as to state that even in the unlikely event her application was granted, she would sell the station.

78. So, based on the foregoing, and under ordinary circumstances, Ochoa would be denied any quantitative integration credit, and we would proceed from there.

79. But these are not ordinary circumstances. During the course of the hearing, Ochoa has inserted an additional factor into the adjudicatory equation. We are now dealing with a principal who testified falsely in open hearing. Not only that, but when she was confronted with evidence that exposed her falsifications, she repeated them. It was only after much time, money, and effort were expanded, that she finally conceded that she had misled those individuals who had testified contrary to her falsities; Gurley, Thorn, Litaker and Jablonski./11

80. The Trial Judge can't grant such an applicant. It's true that no character issue has been set down against Ochoa. In

fact neither of her opponents have even asked for one. But that is of no moment. An implicit character issue exists with respect to the truth and veracity of every witness who is a principal in a hearing case, or who is a person under a principal's control in a hearing case. Truth and candor are always in issue.

81. Issues are designated to place an applicant or licensee on notice of the charges he or she will be required to meet at the hearing. But notice to an applicant that he or she must testify truthfully and not conceal material information is superfluous. That's what the oath is for.

82. No unfairness results to hold that an applicant has knowingly assumed the risk of an adverse character determination, when she testifies falsely at a hearing. Maria Ochoa testified falsely in open hearing. Her application will be denied. See Nick J. Chaconas, 28 FCC 2d 231, 233 (1971); Grenco, Inc. et. al., 39 FCC 2d 732 (1973); RKO General Inc. (WNAC-TV), 78 FCC 2d 1 (1980) at 104 (para. 221); and Rebecca L. Boedker, 5 FCC Rcd 2855 (Rev. Bd. 1990).

Quantitative and Qualitative Integration

83. Maria Ochoa. As previously noted, as sole proprietor, Ochoa seeks 100% quantitative integration. She claims she will work full-time (at least 40 hours a week) as general manager of her FM station. Her 40 hours minimum will include the hours between 8:00 a.m. and 5:00 p.m., Monday through Friday.

84. As general manager she will direct the overall station operation; i.e., she'll set general policies to govern finances, sales, administration, and employment. She'll set and oversee programming policies. She will hire and fire all employees and she will administer and implement the station's equal opportunity program. She'll oversee the station's public relations and community outreach efforts. This includes overseeing the on-going ascertainment of local needs.

85. Maria Ochoa, born Maria Victoria Martinez, was born on July 4, 1969, in Havana, Cuba. She grew up in Charleston, South Carolina, and became a U.S. Citizen in 1973. She currently resides in Charlotte, North Carolina, outside the proposed station's 1 mV/m contour. She asserts that she will move to Lenoir if her application is granted (but see paras. 55-81 supra.).

86. Ms. Ochoa graduated from the University of South Carolina in 1981 with a B.A. in Journalism. She has past broadcast experience. From January 1982 to August 1983, she was an Account Executive with Stations WBZK-AM,.and WDZK-FM, York, South Carolina. From August 1983 to April 1987, she was an Account Executive with Station WEZC-FM, Charlotte, North Carolina.

87. In April 1987 she became Local Sales Manager for Station WEZC-FM. From August 1988 to January 22, 1991, Ochoa was the General Sales Manager for WMXC-FM (formerly WEZC-FM), Charlotte, North Carolina. Both as Local Sales Manager,

and as General Sales Manager, Ochoa supervised sales persons and was responsible for hiring and firing.

88. From February 25, 1991, until the fall of 1991 (around October 30, 1991) she was senior account executive with Station WGKL-AM and FM, Charlotte N.C. But starting in the fall of 1991, she left broadcasting. She has started sales activity with the New York Life Insurance Company looking toward becoming a New York Life agent.

89. Maria Ochoa hasn't been civically active within the proposed station's 1 mV/m contour. But she does claim those comparative enhancements due a White, Hispanic female.

90. Gateway. Gateway claims 100% quantitative integration based on the proposed day-to-day integration of their sole general partner, Susan Rowe. Rowe has a 50% equity interest and 100% voting interest in Gateway. She proposes to work full-time (at least 40 hours a week) as General Manager of the proposed station.

91. As General Manager, she will supervise all aspects of the station's day-to-day operation. This will include hiring and firing personnel, setting station policies on employment, financial sales, and the administrative aspects of the station's operation. She will determine the programming, administer and implement the station's equal opportunity program, and assume responsibility for complying with the FCC's regulations. She will oversee the station's public affairs and community involvement activities. This includes ascertaining local needs and

interests for programming. Ms. Rowe has no other employment or business obligations which might conflict with her integration pledge.

92. Susan Rowe was born on June 13, 1961. She moved to Caldwell County (where Lenoir is located) in August 1983, and lived there until March 1986. Although she didn't live within the Lenoir city limits at that time, her residence was within the proposed city-grade contour of the station. From March 1986 until January 1987, she lived within the Lenoir city limits. She then left the area for about 18 months. She returned to Lenoir in July 1988 and has resided there ever since. She currently resides at 111 Maple Drive in Lenoir.

93. Ms. Rowe holds a Bachelor of Science degree in finance from Clemson University. Her employment background is in accounting and finance. She has worked in the accounting departments of the Uniroyal-Goodrich Tire Co., Sealed Air Corp., and Bernhardt Furniture Co. She is presently a temporary, part-time Cost Accountant with Greer Laboratories, Inc. (see Finding 21 supra.).

94. Susan Rowe has no past broadcast experience. However, she does have some civic participation within the city of license. From 1984 until January 1987 she was active in the Lenoir Business and Professional Women's Club (BPW). She was Assistant Treasurer and Chairperson of BPW's finance committee. She was BPW's Treasurer from June 1986 to January 1987.

95. Since the fall of 1984, except for January 1987 to July 1988, Ms. Rowe has

been an active member of St. James Episcopal Church in Lenoir. She has taught Sunday School and participated as a lay reader. Since August 1988, Ms. Rowe has been a dues-paying member of the Fairfield Neighborhood Association. She currently organizes and participates in waste recycling efforts in Fairfield Neighborhood on a monthly basis.

96. Susan Rowe claims those comparative enhancements due a White, non-Hispanic female.

97. Foothills Broadcasting. Foothills claims only part-time integration. They premise their claim on a proposal to integrate their two voting stockholders: John B. Beall, and Steven Frank. John Beall (82% voting, and 45% equity) is the President, Treasurer and Director of Foothills. Steven Frank (18% and 10% equity) is Vice President, Secretary, and a Director.

98. First, Foothills will integrate John Beall into its proposed day-to-day operation part-time. Beall will serve as General Manager of the proposed station 20 hours a week (minimum). As the part-time General Manager, Beall will be solely responsible for developing and implementing all station financial and sales policies. He will work with the other integrated stockholder, Steven Frank, to jointly develop program policies. Beall will ultimately hire, fire, and promote all non-programming department employees, and supervise those employees on a daily basis. Typically he will work at the station from 8 to noon.

99. John Beall was born on March 18,

1948. Except for the four years he attended college he has lived in Lenoir.

100. Beall presently owns part of and is the Chief Operating Officer of both Beall Oil Corporation and BCW, Inc. of North Carolina. Beall Oil and BCW are related entities that operate retail gasoline, oil and convenience store businesses. In order to meet his part-time integration commitment Beall plans to assign some of his present duties at Beall Oil and BCW to Mr. Robert Haus. He has 25 years of experience in similar businesses, has been an employee of Beall Oil for four years, and is presently the Sales Manager.

101. John Beall has no broadcast experience but he has been civically active in Lenoir. From 1980 to 1984 he was a Deacon of The First Presbyterian Church, and from 1989 to the present he has been an Elder. From 1984 to 1988 he was on the Board of Directors of the Caldwell County Chamber of Commerce; from 1986 to 1990 he was a member of the Caldwell County Board of Commissioners, and Chairman of the Board in 1988 and 1989; from 1985 to 1989 he was a Trustee of Caldwell Community College and Technical Institute; from 1985-1990 he was a member of the N.C. Energy Policy Council; and from 1985 to the present Beall was a member and Founding Chairman of the Board of the Caldwell County Economic Development Commission.

102. Beall is a White, non-Hispanic male. So he's not entitled to any minority or female comparative enhancements.

103. Second, Foothills will integrate 10% equity holder and 18% voting shareholder, Steven Frank, full-time into their proposed day-to day operations. Frank will serve at least 40 hours per week as Program-News Director. In that capacity he'll be responsible for the content of all station programming. That includes entertainment, news, and public affairs. He will supervise all program department employees on a daily basis. He will resign from his current employment before Foothills' station starts operating.

104. Steven Frank was born on October 20, 1952. He has lived in Lenoir continuously since August of 1981, and currently resides at 151 Mayhill Place, Lenoir.

105. Mr. Frank has past broadcast experience. From January to May 1977 he was an Announcer/Salesman at Station WDBM(AM), Statesville, North Carolina. Then in 1977-1978, he was a Newsman, Public Affairs Announcer at WBUY/WIXN(AM & FM), in Lexington, North Carolina. In 1978 Frank moved to Roanoke Rapids, North Carolina where he was the News and Public Affairs Director for WCBT(AM). He stayed there until 1981. In 1981, he became News Director for WJRI(AM) in Lenoir, where he remained until 1987. At the same time in 1983, he became a part-time News Reporter for WSOC-TV serving Caldwell and western North Carolina counties. He worked for WSOC-TV until 1988. For a short while, November of 1987 until January 1988 he was General Manager of WKGX(AM) in Lenoir. From July 1987 to the present time he has

been a Contract Employee, a News Reporter for WSOC-TV, Charlotte, N.C. As when he worked for WSOC-TV part-time his beat is Caldwell and other western North Carolina counties.

106. Steven Frank has participated in some civic activities within the proposed station's 1 mV/m contour. Between 1982 and the present he has co-produced several slide-tape/video-tape programs about historic events in Caldwell County for showing in local schools. In 1983 he served on the Board of the Caldwell County (Lenoir) Arts Council.

107. From 1983 1990, Frank was on the Board of Directors of the Lenoir Crimestoppers. He has produced video programs for civic club presentations, coordinated press releases on organization activities, presented awards to persons reporting crimes and assisted law enforcement officials in investigating crimes.

108. Frank has been a member of the Caldwell County (Lenoir) Chamber of Commerce from 1984 to the present. In 1984 he wrote, produced, taped and edited a video program about Caldwell county. This was a joint project between the Chamber and the County Economic Development Commission. From 1989 to the present he has served on the committee which sponsors an annual 100 mile plus bicycle race in Caldwell County. He prepared publicity and photographs to publicize the event. From 1990 to the present he has been on the committee preparing for Caldwell County's sesqui-centennial celebration.

109. Frank is a white, non-Hispanic male, so he's not entitled to any minority or female comparative enhancements.

110. All three applicants propose to use auxiliary power.

## Conclusions of Law

1. Three applicants remain in the competition for FM Channel 277A in Lenoir, N.C.; Maria M. Ochoa, Gateway Media Limited Partnership, and Foothills Broadcasting, Inc.

2. We took evidence on four factual issues. Three of them are basic qualifying issues. Gateway faces a financial issue (Issue 1); and Foothills faces a misrepresentation (Issue 2), and a "sham" applicant issue (Issue 3). The fourth factual issue is the standard comparative issue (Issue 4).

3. Only basically qualified applicants are entitled to a comparative analysis. See e.g. Louis Adelman, 29 FCC 1223, 18 RR 1062 (1960) affirmed sub. nom. Guinan v. Federal Communications Commission, 297 F.2d 782, 22 RR 2026 (1961). So before we examine the standard comparative issue, we must come to grips with Issues 1-3.

4. Issue 1: Gateway's Financial Issue. Under Commission and Review Board precedent, Gateway must make a forward-backward presentation. They must prove that they presently are financially qualified, and they must also prove that they were financially qualified on June 15, 1989 when they first certified that they were. See BPH-890616MN; Aspen FM,

Inc., FCC 90R-37, rel. May 23, 1990 at paras. 15-17; and Shawn Phalen, FCC 90R-64, rel. July 24, 1990.

5. Gateway has met the forward-looking test. They've proved that they are presently financially qualified; i.e., they have shown that they now have sufficient net liquid assets available ($425,000) from a committed source (First Union Bank) to construct and operate the requested facilities for three months without revenue. Findings 19-22 supra. The First Union January 18, 1991 loan letter when buttressed by William White III's personal loan guarantee provides the forward-looking assurance.

6. But just as surely as Gateway meets the forward-looking prong of the Aspen-Phalen two prong test, they fail the backward-looking test. Gateway wasn't financially qualified on June 15, 1989 when General Partner Susan Rowe certified they were. (See BPH-890616MN, Findings 5-18 and 23-27 supra.).

7. Stated simply, when Gateway filed their application on June 16, 1989, they didn't have sufficient net liquid assets on hand or sufficient funds available from committed sources to construct and operate the requested facilities for three months without revenue. The First Union's [second] June 6, 1989 loan letter was defective and amounted to nothing more than an accommodation, and a poor one at that. In addition, meaningful loan guarantee letters weren't even in existence at the time.

8. The reason that Gateway can demonstrate that it was financially

qualified the second time around, but didn't the first time around can be traced to General Partner Susan Rowe's conduct. She bungled the job the first time. She could have taken: (1) the $425,000 written construction and operation estimate she had prepared; (2) the sample bank loan letter FCC counsel had given her; and (3) a written loan guarantee from her wealthy husband (William White), and gone down to First Union Bank. There she could have detailed what she needed with Stephen McCord and undoubtedly obtained a loan letter identical to the one she later obtained on January 18, 1991.

9. But Ms. Rowe didn't do that. Instead she took only the sample bank loan letter her counsel had given her, and approached a neighbor of hers, Al Wood, who was a Branch Manager of First Union in Lenoir. She gave Wood the sample bank letter, told him she needed a letter stating the bank's "interest" in providing funds, and asked him to handle the matter. The net result was an accommodation letter that wouldn't pass Commission muster.

10. Now it isn't that Susan Rowe was dishonest. She was careless; she handled an important portion of Gateway's application in a sloppy manner; she botched the job. So Gateway must pay the price for Rowe's blunder. Since Gateway has failed the backward portion of this Aspen-Phalen forward-backward test, they have failed to demonstrate that they're financially qualified and their application will be denied.

11. Issues 2-3: Foothills' Sham and Misrepresentation Issues. Issues 2 and 3 will both be resolved against Foothills. Foothills filed their application on June 16, 1989. There they represented to the Commission, to their opponents, and to the public that there existed a two-tier (voting and non-voting stock) corporation; that there were only three stockholders; and that two of the stockholders (Beall and Frank) were voting and active stockholders while the third (Respess) was a non-voting, passive shareholder.

12. These representations proved to be abjectly false. No such corporation legally existed on June 16, 1989. Foothills, if it legally exists at the present time, did not come into being until on or about September 12, 1989. That's when the corporate organizational meeting was held; that's when the stock certificates were completed;/12 that's when the Initial Franchise Tax Return was prepared and forwarded to Raleigh; and that's when other vital corporate documents were prepared./13 In fact, the memorandum confirming the availability of the corporate name (Foothills Broadcasting, Inc.) is dated September 29, 1989.

13. Not only were the ownership structure representations contained in the June 16, 1989 application false, but Foothills' three stockholders were well aware they were false. The record is replete with the evidence that documents have been backdated to make it appear that Foothills Broadcasting, Inc. legally existed on June 16, 1989, when they filed

their application.

14. Accordingly, the conclusion is warranted under Issues 2 and 3 that Foothills' ownership structure is a sham; that their three stockholders knew it was a sham; and that Foothills misrepresented the facts about their ownership structure when they filed BPH-890616MP.

15. Moreover, Foothills has misrepresented their ownership structure in another way. They have represented to the Commission, its opponents and the public that Wallace Respess, a 45% equity holder, is a passive, non-voting stockholder. Respess has been anything but. He is an attorney-at-law, a partner, and 40% owner of Todd, Vanderbloemen, Respess and Brady, a law firm in Lenoir.

16. Respess retained his own law firm to be Foothills'corporate counsel. It is Respess' partner, Bruce Vanderbloemen that organized Foothills. In addition, Respess has actively participated in the prosecution of Foothills' application. He recruited two rebuttal witnesses to Maria Ochoa's case; i.e., Jake Gurley and Reta Thorn. He personally paid the airfare for Gurley, Thorn and a third person to come to Washington, D.C. and testify.

17. Respess has initiated and handled several settlement negotiations; he has sent application materials to Foothills' FCC counsel; he regularly confers with Beall, Frank, and FCC counsel; Foothills' voting stockholder, and President John Beall immediately contacts Respess for his advice when important matters come up; Beall received a copy of his deposition directly from Respess; and either Respess

or his law firm has directly turned over Foothills' documents to Foothills' FCC counsel without President Beall's knowledge. In fact, the conclusion is warranted that Foothills' Lenoir FM venture is primarily non-voting stockholder Wallace Respess' undertaking.

18. So the conclusion under Issue 2 must be that Foothills lacked candor with and misrepresented the facts to the Commission, their opponents and the public about their ownership structure when they filed BPH-890616MP; and that this lack of candor and those misrepresentations render Foothills of unfit character to be a Commission licensee.

19. Next, under Issue 3 the conclusion is warranted that Foothills' two tier (voting and non-voting) ownership structure is a "sham." Consequently, Foothills is not qualified to be a Commission licensee.

20. Ochoa. Since neither Gateway nor Foothills are basically qualified to be a Commission licensee, one would think that ends the matter; that the only basically qualified applicant, Ochoa would be the winner. She faces no basic qualifying issues. In fact, neither of her opponents even asked for a basic qualifying issue against her. So under ordinary circumstances she would receive the grant.

21. But, as previously noted (Findings 78-81 supra.), these are not ordinary circumstances. During the course of the hearing Ms. Ochoa inserted an additional complexity into the adjudicatory equation.

22. She chose to testify falsely in open hearing. Not only that, but when she was confronted with her falsifications, she repeated them, and stood by them. It was only after her opponents expended much money, time, and effort (in a rebuttal session) that Ochoa finally came clean. She finally conceded that she had deliberately misled those individuals who were subpoenaed, who traveled to Washington, D.C., and who testified contrary to her falsities: (1) Jake Gurley; (2) Reta Thorn; (3) Susan Litaker; and (4) Johnny Jacobs.

23. Character issue or no character issue, this Trial Judge cannot grant such an applicant. He therefore must invoke the policy that both the Review Board and the Commission have used on similar occasions; namely, that truth and candor are always in issue. See Nick J. Chaconas, 28 FCC 231, 233 (1971); Grenco Inc., 39 FCC 2d 732 (1973); RKO General, Inc. (WNAC-TV), 78 FCC 2d 1 (1980) at 104 (para. 221); and Rebecca L. Boedker, 5 FCC Rcd 2855 (Rev. Bd. 1990).

24. Truth and candor are always in issue. An implicit character issue exists with respect to the truth and veracity of every witness (including Ochoa) who is a principal in a hearing case, or is a person under a principal's control in a hearing case.

25. Issues are designated to place an applicant or licensee on notice of the charges he or she will be required to meet at the hearing. But notice to an applicant (here Ochoa) that she must testify truthfully, and not conceal

material information is superfluous. That's what the oath is for. Maria Ochoa took that oath.

26. No unfairness results to hold that Ochoa has knowingly assumed the risk of an adverse character determination, when she testifies falsely at a hearing. Maria Ochoa testified falsely in open hearing. Her application will be denied.

Ultimate Issue 5

27. Under the ultimate issue, and in the light of the evidence adduced pursuant to the specified issues,/14 we must decide "which of the applications should be granted, if any." The answer is none.

SO, unless an appeal is taken from this Initial Decision or the Commission reviews it on their own motion, Maria M. Ochoa is not of fit character to be a Commission licensee, and her application (BPH-890615ME) IS DENIED;/15

Gateway Media Limited Partnership was not financially qualified on June 15, 1989, and their application (BPH-890616MN) IS DENIED; and

Foothills Broadcasting, Inc. has filed a "sham" application and is not of fit character to be a Commission licensee, and their application (BPH-890616MR) IS DENIED.

Walter C. Miller
Administrative Law Judge

FOOTNOTES

/1 Five of the eight were dismissed early on: (1) Mystic Radio Corporation (BPH-890906MO) was dismissed on December 17, 1990 (FCC 90M-3982); (2) Sundown Communications (BPH-890612MI) and (3) Bowman Communications, Inc. (BPH-890616MK) on January 4, 1991 (FCC 91M-21); (4) Janet Lingafelt(BPH- 890616MO) on January 7, 1991 (FCC 91M-38); and (5) Furniture City Broadcasters, Inc. (BPH-890616MM) on January 30, 1991 (FCC 91M-351).

/2 The case ended up being tried in three phases.

/3 In the interest of organization and clarity the issues have been renumbered and repositioned.

/4 See FCC 91M-625 rel. Feb. 15, 1991.

/5 See FCC 91M-1663 rel. May 17, 1991.

/6 The stock subscription agreements that Foothills' produced are only partially executed and undated. See Ochoa Exs. 4, 5, and 6.

/7 Beall and Respess purportedly took out a bank note to fund the corporation's expense. But Foothills was unable to produce a copy of that note.

/8 Respess' firm via Vanderbloemen previously provided legal services for Respess, Beall, and Frank when they were owners in High Country Broadcasting. High Country was an FM applicant for Banner Elk, N.C.. The Banner Elk application was dismissed pursuant to a settlement, the Foothills'principals made a profit on that settlement.

/9 At one time, and in the interest of giving the reader the entire picture in

one place the Trial Judge would have repeated the facts in para. 28. However, the Review Board has disabused him of this practice. See, Shawn Phalen, FCC 92M-164 rel. Feb. 5, 1992 at n.1.

/10 Ochoa also presented the testimony of WMXC's news editor, Karen Barnes. That testimony proved amorphous.

/11 Ochoa apparently was able to convince her husband David that Gurley, Thorn, Litaker and Jablonski had all lied. See, Finding 73, supra.

/12 The stock certificates for Foothills' three owners are dated June 14, 1991, two years after their application was filed, and over six months after this case was designated for hearing.

/13 The stock subscription agreements that Foothills finally made available for inspection and copying are only partially executed and undated.

/14 Note however that comparative findings have been made on all three applicants. See, Findings 49-10, supra This means that if an appellate body determines that a standard comparison is necessary, all the data is there. No remand is needed. Stated another way, findings of fact have been made on all issues, and conclusions of law have been made on all material issues. See, WFPG, Inc., 33 FCC 673 (1962), at para. 13; Alkima Broadcasting Co., 30 FCC 932, 21 RR 732 (1961), at n.2; Sayger Broadcasting Co., 32 FCC 399, 22 BR 1059 (1962) at n. 7; 47 CFR 1.267(b), and 5 USC 557(c)(A).

APPENDIX D, DECISION, FCC 92R-81, rel. Oct. 13, 1992, 7 FCC Rcd 6569 (Rev. Bd.)

By the Review Board:

1. This case involves three competing applications for a new FM broadcast station at Lenoir, N.C.. The case was tried before Administrative Law Judge Walter C. Miller on a financial qualifications issue against Gateway Media Limited Partnership; misrepresentation or lack of candor and "sham" issues against Foothills Broadcasting, Inc.; and the standard comparative issue. In his Initial Decision, 7 FCC Rcd 1861 (1992) (I.D.), the ALJ resolved the basic qualifications issues adversely to Gateway and Foothills, resulting in their disqualification. Although no qualifying issue was outstanding against Maria Ochoa, the ALJ found that she testified falsely in open hearing and that her application could likewise not be granted. Thus, all three applications were denied. Exceptions and replies have been filed by each applicant. For the reasons set forth below, we affirm the ALJ's disqualification of Ochoa and Gateway. We disagree, however, that the evidence supports Foothills' disqualification, and thus grant its application.

2. Ochoa is a sole proprietor, claiming 100% quantitative integration credit predicated on Ochoa's commitment to work full-time as the station's general manager. Ochoa Exh. 1. She currently resides in Charlotte, N.C., and at the time her application was filed on June 15, 1989, she was the general sales manager of Station WMXC-FM in Charlotte. I.D.,

Findings para. 56. In her direct written case, she pledged to sever all connections with WMXC and move to Lenoir in the event the Commission granted her application. It is in the context of Ochoa's responses regarding her proposal to move to Lenoir, elicited under the standard comparative issue, that the disqualifying testimony occurred. We reproduce verbatim the testimony the ALJ found candorless, commencing with cross- examination of Ochoa:

COUNSEL: Did you tell anyone at WMXC that you were filing your application with the FCC?

OCHOA: Yes.

COUNSEL: And who did you tell?

OCHOA: My immediate supervisor.

COUNSEL: Who was?

OCHOA: Jake Gurley.

COUNSEL: Jake Gurley?

OCHOA: Yes.

COUNSEL: Did you tell anyone else at that station?

OCHOA: I told my co-workers.

COUNSEL: Did you tell them that in your application, you are proposing to move to Lenoir?

OCHOA: Yes.

COUNSEL: Did you tell that to Jake Gurley?

OCHOA: Yes.

Tr. 80-81. On further cross-examination, she responded:

COUNSEL: You indicated, in answer to a question from [first opposing counsel] that you had spoken with Mr. Gurley about your Lenoir application and indicated to him that you planned to move to Lenoir in

the event that it was granted.

When did you have that conversation with Mr. Gurley?

OCHOA: That was in June of '89.

***

COUNSEL: You mentioned, a moment ago, that he was your supervisor, until your last 90 days of employment.

Who was your supervisor during those last 90 days?

OCHOA: A new general manager came in, by the name of Reta Thorn.

COUNSEL: Did you also discuss with Ms. Thorn your pending application in Lenoir?

OCHOA: Yes.

COUNSEL: And what did you tell Ms. Thorn?

OCHOA: That it was pending and just brought her up to date on just what was happening with it, just made her aware of it.

COUNSEL: And did you make her aware of the fact that you, again, proposed to leave WMXC if your application was granted?

OCHOA: Yes.

Tr. 103-104.

3. In a similar vein, she responded:

COUNSEL: Do you recall talking to Mr. Gurley in the summer of 1990 [a year after filing her application], about joining a group he was forming to purchase WMXC and some other stations, owned by EZ Communications, Inc.?

OCHOA: Yes.

COUNSEL: And weren't you to be a stockholder in that group?

OCHOA: Yes.

COUNSEL: Let's assume, for a moment, that his proposal to purchase WMXC and the other stations had gone through, did you indicate to him that you would continue work at WMXC?

OCHOA: I am sorry. Could you repeat the question?

COUNSEL: During the course of your conversations with Mr. Gurley, did you indicate to him that if,indeed, he was able to purchase WMXC and the other stations, you would continue to work at WMXC, after that purchase?

OCHOA: Yes.

COUNSEL: Was the subject of your Lenoir application raised, in these discussions?

OCHOA: No. They were all very speculative discussions.

COUNSEL: So during those discussions, you didn't tell Mr. Gurley that you were trying to move to Lenoir?

OCHOA: He was already aware of that.

Tr. 109-111.

4. Seeking to undermine Ochoa's testimony, counsel for Foothills produced a declaration under penalty of perjury from Jake Gurley (Foothill Exh. 7), in which Gurley averred he was told by Ochoa that she never intended to work at her proposed Lenoir station and would sell the station if her application were granted. Tr. 114. The ALJ read aloud the allegations from the declaration and asked Ochoa whether she had made such statements to Gurley. Tr. 116-117. She said, "No sir, I did not." Id. After she was excused from the witness stand, counsel for Foothills

moved for permission to adduce rebuttal testimony. Tr. 127. He reported that he had subpoenaed Reta Thorn, and represented she would testify that, on two occasions in late 1990 and early 1991, Ochoa had stated in public she had no plans to leave her employment at WMXC and intended to sell the Lenoir station if her application were granted. Tr. 127-128. The ALJ granted Foothills' request, and after listening to Thorn, ordered the attendance, at a second phase of the proceeding already scheduled, of certain other individuals who allegedly possessed first-hand knowledge of the facts on this matter. Tr. 433-439.

5. Three witnesses in rebuttal appeared: Edward Jablonski, Jake Gurley, and Sue Litaker. Each testified that Ochoa had stated in their presence that she had no intention to move to Lenoir. Tr. 603-604, 653-654, 743-744. Gurley and Litaker also declared that Ochoa had indicated she would sell the station if she received the grant. Tr. 654, 659, 743-745, 760-762. In opposition, Ochoa presented four witnesses, Milton Sigmon, Karen Barnes, Sylvia Pinson, and Ochoa's husband, but their testimony focused simply on whether Ochoa would in fact move to Lenoir rather than what Ochoa had said to the other witnesses.

6. Ochoa, who had personally listened to the witnesses, returned to the stand. Her immediate response was to retreat from her prior position, asserting that she had couched her comments to Gurley and Thorn in the negative so that they would not think she was leaving shortly to run the station at Lenoir. Tr. 985, 1004-1005. The

ALJ read aloud his earlier questions and Ochoa's negative answers from the first hearing sessions concerning whether she had ever told Gurley that she had no intention of moving to Lenoir and would sell the station. Tr. 1013-1015. When asked whether after listening to Gurley, Thorn, Jablonski, and Litaker, they could all have had it wrong, she responded that they heard or misinterpreted what they wanted to hear and what they wanted to interpret. Tr. 1016-1017. The ALJ then elicited her final testimony on the matter:

ALJ: In passing, I note that these four people, three of them well, at least Reta Thorn and Jake Gurley were in a position to cause you serious problems if they suspected that you were going to leave the organization high and dry, and from your testimony, I think you suspected that Johnny Jacobs [Jablonski's air name] had wires, was wired to Jake Gurley, so that he could cause you problems if you left the organization high and dry. And you knew Susan Litaker had been Jake Gurley's executive assistant and had the, probably had the ear of management and could leave you high and dry. And you, not only you needed, I would suspected that you wanted to keep a $70,000 job with a $5,000 allowance and a car. Did you tell them, no, I am not going, I'll be here at WMXC, don't you worry about it, in order to protect your shoulder blades?

OCHOA: I probably led them to believe that. By couching everything I everything that I ever said about it in the negative.

I can understand --

ALJ: And you wouldn't need you wouldn't, for example, have to be so careful, you could express feelings to Karen Barnes and no one would, you know, Karen can't hurt you.

OCHOA: Right.

ALJ: And so that there's a possibility that Karen Barnes could give a different perception of your future plans than say Jake Gurley, isn't that a possibility?

OCHOA: Sure.

ALJ: And isn't that in fact what happened?

OCHOA: Yes.

ALJ: Proceed, [counsel].

And to continue it, to continue the line of thinking, because you told or gave them the impression that you were not going to go to Lenoir, didn't mean that you had abandoned your original intention of going to Lenoir? But that was something that you knew?

OCHOA: Right.

ALJ: And you didn't want them to know?

OCHOA: Right. I mean I just -- yeah.

ALJ: All right. Proceed, [counsel].

And you see, coming back to that first testimony, had you said to me, when I asked you those questions directly, had you said to me, Judge, I may have used words that conveyed the impression, your testimony today, conveyed the impression that I was going to stay with WMXC and he didn't need to worry, Jake was safe, he wouldn't be left high and dry without a sales manager, had that been your answer there, you see, I would -- there might have never been a rebuttal

session.

OCHOA: I wish I would have known.

Tr. 1017-1019.

7. In her exceptions, Ochoa contends that the ALJ erred in disqualifying her without first specifying a basic qualifying issue. She asserts that her testimony was consistent throughout the hearing, and argues that the witnesses could have legitimately misinterpreted her statements because she wanted to downplay the prospects of leaving the station.

8. DISCUSSION. It is well-established that an applicant may be disqualified in the absence of a basic qualifications issue for candorless testimony occurring directly before the agency where the misconduct was of such a blatant and unacceptable dimension that its existence cannot be denied. RKO General, Inc. v. FCC, 670 F.2d 215, 235 (1981), cert. denied, 456 U.S. 927 (1982); William M. Rogers, 92 FCC 2d 187, 199 (1982). "The Commission has long held that false statements in the course of the hearing process are, in and of themselves, of substantial significance, that specific notice to an applicant that he [or she] must testify truthfully is superfluous, and that such false testimony may lead to disqualification." Old Time Religion Hour, Inc., 95 FCC 2d 713, 719 (Rev. Bd.1983) (citations omitted).

9. In the case at bar, the specification of a discrete disqualifying issue concerning what Ochoa testified to at hearing would have been superfluous. The ALJ, in any event, established procedures

for the second phase of the proceeding that clearly placed Ochoa on notice that her truthfulness was at issue and provided her with ample opportunity to address the matter. See paras. 5-6, supra. See Kuhn v. CAB, 183 F.2d 839, 842 (D.C. Cir. 1950) (if parties "understand exactly what the issues are...they cannot thereafter claim surprise or lack of due process" "when the proceedings are had.") Ochoa is in error that she testified consistently throughout the hearing sessions. She explicitly declared at the initial hearing session that she had told her supervisors, Gurley and Thorn, and coworkers she would move to Lenoir if her application were granted and that Gurley was clearly aware of her plans. It was only after significant time, money, and efforts were expended by the opposing parties to refute this testimony that Ochoa disavowed it and conceded she had couched her statements to her supervisors and coworkers in the negative, and could understand how they misinterpreted her comments and arrived at a belief that she was not intending to move to Lenoir or to operate the station. In this regard, our affirmance of the ALJ's holding is not dependent on whether Ochoa was truthful or not to her coworkers about her future plans; rather, it is based solely on whether she testified candidly at hearing, and the testimony quoted above reveals that she did not.

10. Although the Commission in some circumstances has shown leniency towards applicants that have been less than candid, see Broadcast Associates of Colorado, 104 FCC 2d 16 (1986)(false

testimony at deposition recanted prior to hearing), more recently, "the Commission's demand for absolute candor [has] itself [been] all but absolute." Emission De Radio Balmeseda, Inc., 7 FCC Rcd 3852, 3588 (Rev. Bd. 1992). See Richardson Broadcast Group, 7 FCC Rcd 1583 (1992). In Richardson, an applicant was disqualified for evasive testimony about her age, length of continuous residence in the community of license, status of retirement, discussions with her husband about his intention to be integrated at the proposed station, and her son's involvement in the prosecution of the station. 7 FCC Rcd at 1585. The Commission held that the collective and general sense of her candorless testimony required her disqualification. See also WCVQ, Inc., 5 FCC Rcd 3824 (1990) (extraordinary interlocutory intervention to test truthfulness of prior integration pledge); Frank Digesu, Sr., FCC 92-373, released August 25, 1992 (post-I.D. and Board Decision petition to enlarge granted to explore on remand principal's claimed past broadcast experience). We can do no less here. No factual or legal error having been demonstrated, we perceive no principled basis to disturb the holding of the ALJ who had "the opportunity to observe the witnesses"; whereas we "view a cold record--one devoid of emotion and full contextual impact." WEBR v. FCC, 420 F.2d 158, 162 (D.C. Cir. 1969).

11. In light of our disposition, we do not reach non-decisional exceptions raised as to the veracity or bias of the rebuttal witnesses or to the ALJ's failure to add

financial and related issues against Ochoa. Were we not to disqualify Ochoa for her candorless testimony, however, a further hearing would be required on the allegations that Ochoa never intended to relocate at Lenoir and that she filed her application solely to extract a settlement, since they raise a substantial and material question of fact. See Frank Digesu, supra.

12. Gateway is a limited partnership organized under N.C.law and comprised of one general partner, Susan L. Rowe, and one limited partner, Margaret W. Hoffman. I.D. para. 51. In its application, filed June 16, 1989, Rowe certified that the applicant had "sufficient net liquid assets on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue." Gateway Appln., Section III. The ALJ added an issue to determine whether Gateway was financially qualified on the date it so certified, and whether it is qualified currently, following a motion to enlarge issues filed by Foothills. MO&O, FCC 91M-625, rel. Feb. 15, 1991. The ALJ thereafter concluded in his I.D. that Gateway was not financially qualified when it certified, and that, under FCC precedent. it could not rehabilitate itself by subsequent actions. I.D. Findings paras. 22-27, Concis. paras. 4-10.

13. The findings are as follows. Approximately, two weeks before certification, Rowe contacted a neighbor, Al Wood, who was also a branch manager at

First Union Bank in Lenoir, and told him about her plans to file an application for the instant facility. I.D. Findings para. 8. She gave him a sample bank loan commitment letter that she had obtained from communications counsel and informed Wood that she desired a similar letter from First Union. Id. at para. 9. Wood replied that he could not authorize commercial loans but would turn the matter over to Stephen McCord, First Unions' commercial banking manager for Lenoir. Id. Wood left the sample letter at McCord's office, but only spoke with him by telephone, recounting his conversation with Rowe and her wish to obtain a letter from the bank stating its interest in providing the requisite funds. Id. Rowe, herself, never spoke to McCord nor did she supply him or Wood with either financial statements about herself or the applicant or a business plan regarding the station. Id. para. 16. 14. On or about June 6, 1989, McCord wrote on behalf of First Union two loan commitment letters for Gateway the second letter having been prepared after communications counsel read the first and suggested language corrections. Id. at para. 13. The first letter contained the sentence: "This letter should not be construed as a commitment to lend." The second stated: "any commitment to lend is expressly subject to the borrowing entity meeting all terms, conditions and covenants the bank may deem appropriate." Id. at para. 14. However, McCord, in a deposition held on April 9, 1991, stated that he did not consider the changes to have any

substantive meaning. Foothills Phase II Exh. 6, p. 10; I.D. para. 14. Moreover, counsel and McCord discussed by telephone possible interest rates and repayment terms, but McCord also stated at his deposition that he was "uncomfortable" in including such terms in the second letter because of "not having the benefit of a lot of the detailed information that I expected to get at some point...." Foothills Phase II Exh. 6, p. 31; I.D. para. 15. Following Foothills' motion to enlarge issues, Gateway obtained a third letter from First Union approximately eighteen months after certification, dated January 18, 1991. I.D., para. 20. The ALJ found that the third letter shows that Gateway now has reasonable assurance of funding. Id. at para. 22. In disqualifying Gateway for a lack of reasonable assurance when it certified, the ALJ concluded that the original letters were nothing more than an accommodation by the bank because Rowe never met with McCord or provided First Union with background financial documents necessary for a meaningful loan commitment letter. I.D. para. 25.

15.In its exceptions, Gateway contends there was no need for Rowe to be personally involved in obtaining the bank loan commitment. It argues that McCord was familiar with Rowe's husband, William White, through First Union's dealings with Greer Laboratories, Inc., of which White was then vice-president and a major stockholder, and that White told McCord in May or June 1989 that he would personally guarantee any loan issued by First Union to Gateway. Gateway further

argues that McCord was also aware that White's sister, Margaret Hoffman, and her husband, Eric, were managers at Greer, and that Ms. Hoffman had personally banked with First Union for ten to twelve years. Finally, Gateway criticizes the All for giving no credence to counsel's telephone conversation with McCord prior to certification. Gateway declares that Rowe understood that communication counsel and McCord had discussions to work out the terms of the letter, and based on the foregoing, she had every reason to believe at the time she certified that Gateway had reasonable assurance of the loan from First Union. Alternatively, Gateway excepts to the Commission policy requiring denial of a currently qualified applicant on the basis of circumstances prevailing in the past. Thus, it contends that, even if the evidence is insufficient to demonstrate that it had reasonable assurance of ample funding at certification, the fact that it is now financially qualified, according to the I.D., should entitle it to a grant in the absence of a lack of candor or misrepresentation issue.

16. DISCUSSION. Although an applicant need not have a binding written agreement when relying upon a bank loan commitment for funding to certify that it is financially qualified, Las Vegas Valley Broadcasting Co. v FCC, 589 F.2d 594, 599-601 (D.C. Cir. 1978), it must under well-settled Commission precedent establish a sufficient dialogue with the bank so that the latter has a "present firm intention to make [the] loan, future

conditions permitting." Merrimack Valley Broadcasting, Inc., 82 FCC 2d 166, 167 (1980). We stated in Scioto Broadcasters, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990) : [I]n order for the Board to determine that an applicant has "reasonable assurance" of "committed sources of funds" from a lending institution, we will review the following factors: Whether (1) the bank has a long and established relationship with the borrower sufficient to infer that the lender is thoroughly familiar with the borrower's assets, credit history, current business plan, and similar data, see Multi-State Communications, Inc. v. FCC. 590 F/2d 1117(D.C.Cir. 1978); or, (2) the prospective borrower has provided the bank with such data, and the bank is sufficiently satisfied with this financial information (e.g. collateral guarantees, see Chapman Radio and Television Co., 70 FCC 2d 2063, 2072 (1979)) that, ceteris paribus, a loan in the stated amount would be forthcoming, and that the borrower is fully familiar with, and accepts the terms and conditions of the proposed loan (e.g., payment period, interest rate, collateral requirements, and other basic terms). Short of these ordinary fundamentals, it would be difficult to infer "reasonable assurance" from a "committed source." In other words, central to any successful "reasonable assurance" showing of a loan from a financial institution is that the "individual qualifications" of the borrower have been preliminarily reviewed, Christina Comm., 2 FCC Rcd 1971, 1974 (1987), that adequate collateral has been

demonstrated, Chapman, and that tentative terms of the loan are specifically identified and are satisfactory to both borrower and lender.

17. Here, the ALJ properly found that dialogue was wanting. Indeed, the record reveals that McCord was mistaken who the actual principals of the applicant were, and, as noted in para. 14, supra, he was "uncomfortable" about inserting interest rates and repayment terms in his precertification letters because he did not have the detailed financial and business information necessary to then justify, the particular loan. Foothills Phase II Exh. 6, pp. 5, 7, 30. McCord acknowledged that when he wrote the original letters, he assumed (erroneously) that Messrs. White and Hoffman would also be involved in the Gateway application. Id. However, as Christina teaches, it is the individual qualifications of the borrower that must be preliminarily reviewed, and that scrutiny was patently absent here. It is not particularly relevant that McCord may have been familiar with Greer Labs and William White's and Eric Hoffman's positions there when he prepared the letters since they were not parties to the applicant. And, Gateway is in error that McCord was informed prior to the June 1989 letters that White would personally guarantee any loans made to Gateway. Id. at pp. 8, 30. McCord stated that he first became aware in January 1991, or possibly December 1990, of White's willingness to furnish a personal guarantee. Id.

18. The telephone conversation between

McCord and counsel is also unavailing to show reasonable assurance at certification because the two individuals merely discussed interest rates and repayment terms, not financial or other specific information about the applicant. Moreover, that Rowe may have certified in good faith is not dispositive here. See Margaret Escriva, 6 FCC Rcd 5391, 5392 para. 8 (Rev. Bd. 1991). An applicant faced with a financial qualifications, as opposed to a financial misrepresentation issue, must show objectively that it actually had reasonable assurance of funds at the time of certification. Id. This, Gateway did not do. Finally, The Board cannot negate, or simply ignore, the Commission's clear-cut policy of evaluating financial qualifications as of the time of certification, as urged by Gateway. See Horne Industries, Inc., 91 FCC 2d 1193, 1194 (Rev. Bd. 1982) (Board not empowered to change FCC policy); see also Marlin Broadcasting Inc., 5 FCC Rcd 5751, 5751 para. 6 (1990) (applicant lacking reasonable assurance of financial qualifications at time of certification not entitled to rely on subsequent bank letter to support earlier certification). In sum, we perceive no basis to overturn the ALJ's ruling.

19. In light of the foregoing, we have not reached the non-decisional exceptions raised that the ALJ erred in concluding that Gateway's post-certification January 1991 letter met the Commission's standard of financial qualifications or that he should have disqualified Gateway for false testimony purportedly proffered by Rowe.

The false testimony allegation is troubling, however, particularly in light of the ALJ's disqualification of Ochoa for false testimony, and deserves some comment. As detailed in paras. 11-12 of the I.D., Rowe testified at an earlier session of the hearing (i.e. March 19, 1991) that she had met with McCord prior to receipt of the January 1989 bank letters. She asserted they talked about interest rates, her business plan, and her husband's promise of guarantee. When she was subsequently deposed on April 9, 1991, she acknowledged that she had not met with McCord. Later, she said that she may have talked with McCord but did not remember their conversation. As noted in paragraph 13, supra, she did not meet with McCord. Foothills concurs with the ALJ's failure to disqualify Gateway on this matter, reply brief at n.8, contending that the ALJ's actions should be distinguished from those regarding Ochoa, because the procedure safeguards mandated by RKO General, Inc. v. FCC, supra, were not employed by the ALJ to Gateway. The allegation, however, raises a substantial and material question of fact, and would warrant further inquiry were the applicant not already disqualified. See also Welch Communications, Inc., 7 FCC Rcd 4542, 4545-4547 paras. 18-25 (Rev. Bd. 1992).

20. Foothills represented in its application, filed June 16, 1989, that it was a "For-profit corporation," comprised of two voting shareholders, John Beall and Steve Frank, and one non-voting shareholder, Wallace Respess. Appln., Questions 1, 4, Section II. Beall owns 45%

of the applicant and 82% of the voting stock, while Frank owns 10% of the applicant and 18% of the voting stock. Id. at 4. Respess owns the remaining 45% of the applicant and all of the non-voting stock. Id. In its Integration Statement, Foothills stated that Beall would work part-time, or a minimum of 20 hours per week, as general manager, and that Frank would work full-time, at least 40 hours per week, as the program and news director. Foothills' Exhs. 2-3.

21. Following the adduction of evidence under the standard comparative issue, Ochoa filed a motion to enlarge issues against Foothills, alleging that Respess had been the dominant force in prosecuting Foothills' application. The motion adverted to Respess' admission that he had been Foothills' chief spokesman and negotiator at a settlement meeting held in February 1991, and that he had assisted Foothills' communication counsel in marshalling rebuttal testimony to Ochoa's integration proposal, see para. 4, supra. Respess had also testified that he would perform other services if asked to do so. He is an attorney whose law firm represents Foothills as corporate counsel. In its opposition to avert the addition of issues, Foothills acknowledged that it may have failed in its burden of proof to demonstrate that Respess' non-voting interests should be ignored for calculating integration credit, but it claimed credit for the other two principals, who, it argued, have not been passive in the applicant's affairs or been dominated by Respess.

22. By Memorandum Opinion & Order, FCC 91M-1663, rel. May 17, 1991, the ALJ added two interrelated issues against Foothills; one, to determine whether Foothills lacked candor or misrepresented facts regarding its ownership structure when filing its application; and two, to determine whether Foothills' two- tiered ownership structure is a sham. The first issue was not specifically sought by Ochoa's motion but was added apparently because of the ALJ's confusion regarding a cryptic notation on an invoice from Foothills' corporate counsel, see Ochoa Exh. 7, billing the client for services rendered on September 12, 1989, regarding, inter alia, the organizational meeting; completion of stock certificates and minutes of organizational meeting; and issuance of stock certificates. See Tr. 297-301 The Foothills principals had testified that the organizational meeting had occurred in June 1989. Additionally, certain of the documents produced by Foothills to the opposing parties during discovery were undated or unsigned. Tr. 279-285; 287-289; 4000-402; 404-406.

23. The ALJ disqualified Foothills on issue one, concluding that Foothills' representation that it was a corporation with two voting and one non-voting shareholders was "abjectly false." Id. para. 12. He stated that Foothills was not a legal corporation on the date the application was filed, i.e., June 16, 1989; and that, if it even exists today, it only came into existence on September 12, 1989, the date noted on the billing invoice. Id. The ALJ reported that the

Foothills' principals knew that the representations were false and backdated their documents to make it appear that the corporate structure legally existed on June 16, 1989. Id. at para. 13. The All also resolved the "sham" issue adversely to Foothills, characterizing the putative non-voting shareholder as anything but passive. He relied on Respess' testimony that his law firm served as Foothills' corporate counsel, and on Respess' participation in settlement discussions and efforts to obtain evidence against Ochoa. I.D., Concls. at paras. 15-17. The ALJ also found that Respess had regularly conferred with the other principals and was immediately contacted when important matters came up. Id. He concluded that the FM venture was primarily Respess' undertaking, id., and disqualified the applicant for misrepresenting its ownership structure by indicating that Respess was a passive non-voting shareholder. Id. at para. 15.

24. Foothills objects to its disqualification. It argues initially that the evidence, particularly its Articles of Incorporation, which contains a stamped date of June 15, 1989, by the Secretary of State for North Carolina, clearly demonstrates that it was a corporation when it filed its application. It quotes Section 55-8 of the North Carolina Business Corporation Act then in force: Corporate existence; filing of articles of incorporation, effect ... a copy of the articles certified by the Secretary of State shall be conclusive evidence that all conditions precedent required to be

performed by the incorporator have been complied with and that the corporation has been incorporated under this Chapter, except as against this State in a proceeding to annul or revoke the articles of incorporation. Foothills Br. at 6. Moreover, it disputes the legal proposition that an applicant may be disqualified for subsequently reducing to writing corporate documents that reflect actions agreed to prior to incorporation. On the second issue, it argues that an applicant whose voting shareholders participate substantially in the affairs of the applicant should not be disqualified as a sham applicant merely because its non-voting shareholder, a lawyer, participated in post-designation settlement discussions and assisted in litigation. It concedes, however, that the non-integrated interests of Respess should be attributed to the applicant for comparative purposes.

25. DISCUSSION. The Commission indicated in Cuban-American Limited, 5 FCC Rcd 3781, 3784 para. 21 (1990), that an applicant's failure to execute documents concerning corporate ownership structure, standing alone, does not provide a legal basis for denying integration credit, much less a finding of misrepresentation, since applicants are not required to establish their integration proposals as a legal certainty. See generally Victory Media, Inc., 3 FCC Rcd 2073, 2074 para. 15-16 (1988)(accepted "sworn and unrebutted testimony [confirming] that Victory's principals always intended for the corporation to have two classes of

stock"), Bradley, Hand, and Triplett, 89 FCC 2d 657, 662-663 para. 8 (Rev. Bd. 1982) (state definition of shareholder not relevant for integration policies); Pleasant Hope Broadcasting Co., L.P., 6 FCC Rcd 6553, 6556 para. 16 (Rev. Bd. 1991)(state law not applicable to integration analysis since local laws are unrelated to Commission's comparative policies and purposes). Moreover, there is Commission precedent that a prepared executed copy of a written partnership agreement, bearing the effective date of an earlier oral agreement, does not implicate misrepresentation or a lack of candor where the written agreement simply memorializes the oral agreement and does not purport to represent that the written agreement was physically signed on the date therein. High Sierra Broadcasting Inc., 96 FCC 2d 423, 433-434 para. 21 (Rev. Bd. 1983); Compare Cuban-American Limited, 2 FCC Rcd 3264, 3268 para. 18 (Rev. Bd.1987), aff'd, 5 FCC Rcd at 3784 paras. 22-23.

26. Here, the evidence does not support the inference that Foothills' representations concerning its corporate structure were false or that its principals misrepresented the date their organizational meeting was held. All three Foothills principals testified they attended an organizational meeting in mid-June 1989, prior to the filing of the application, at Beall's office in Lenoir for the purpose of forming a corporation. Tr. 276, 408, 412-413, 529, 573. Their testimony is corroborated by extrinsic evidence: the articles of incorporation

and accompanying jurat, bearing the stamped dates of June 15, 1989, from the Secretary of State of North Carolina, and notary, respectively; and by copies of the checks dated June 16, 19, and July 3, 1989, from the three principals timely remitting their capital contributions. Foothills Exhs. 9, 11, and 12. The checks bear bank clearance stamps of June 19 and July 9, 1989. Respess' check of June 16 also bears the notation "900 shares of stock." Foothills Exh. 11, 12. Although the record is unclear precisely as to the significance of the September 1989 date and notation on the billing invoice, Frank volunteered that it probably reflects when the firm completed its services relative to the applicant, and got around to billing them for it. Tr. 431-432. That speculation appears to be as plausible as any conjecture on the matter; we will not impute misrepresentation on such a mere scintilla of evidence.

27. The fact that the corporate minutes were restructured at a subsequent date and bear the actual date of the meeting is of no moment legally because no showing has been made that the minutes were inaccurate or that the applicant purported to claim that they were physically signed on the date indicated therein. See High Sierra. To the contrary, Respess openly testified that he was "absolutely certain that [the minutes] w[ere] prepared much later" and "could very well" have been prepared in September 1989. Tr. 558-559. He added that this was a very common practice in North Carolina. Tr. 560. Similarly, Respess openly declared that the actual

preparation and dating of the stock certificates probably occurred later than the effective date, perhaps as late as September 1989. Tr.537-539, 559-560.

28. Although Foothills may be faulted because some of its documents produced during discovery omitted signatures or dates, see Ochoa Exhs. 4, 5, and 6, we perceive no motive for imputing misrepresentation or lack of candor since the applicant was not relying on these documents directly to prove that they were incorporated prior to the application filing. Thus, although the applicant's attentiveness regarding its formation was not as "businesslike as might be desired in hindsight," see Isis Broadcast Group, FCC 92R-64, rel. Aug. 13, 1992 para. 36, its shortcomings -- Foothills principal Frank conceded they suffered from "signitis" without more, are insufficient to warrant disqualification. Isis Broadcast Group. On the basis of the evidence above, we cannot find that Foothills misrepresented its corporate structure or deliberately backdated documents.

29. Nor is there persuasive evidence to demonstrate that Foothills is not bona fide or has misrepresented Respess'role in the application. Respess' active participation in the prosecution of the application after the applicant formally organized itself as a two-tiered corporation does, however, require attribution of his non-integrated interests in calculating integration credit, as conceded by Foothills, See Royce International Broadcasting, 5 FCC

Rcd 7063, 7064 para. 9 (1990), recon. denied, 6 FCC Rcd 2601 (1991). Notwithstanding that attribution, an applicant's failure to meet its burden of demonstrating reasonable assurance that its proposal will be effectuated as described, does not, without more, establish that the applicant has committed disqualifying misconduct. Evansville Skywave, Inc., 7 FCC Rcd 1699, 1700 para. 14 (1992). Disqualification must involve deceptive or abusive conduct. 7 FCC Rcd at 1702 ("Taken to its extreme, the failure to define the limits of disqualifying misconduct would lead to a finding of misrepresentation or abuse of conduct in every case in which [the FCC] rejected an applicant's claim of comparative credit"). Id. A fortiori, a mere affirmative certification that: "no limited partner will be involved in any material respect in the management or operation of the proposed station," Question 3 (a), Section II, of FCC 301, does not, as a matter of law, require a finding of misrepresentation, as claimed by Gateway and Ochoa, simply because the applicant later fails to show that its passive principal has not been involved, as here, in the prosecution of the application.

30. In the case at bar, there has been no showing that the nominally active principals have not been involved in the prosecution of the application or that they will not honor their integration commitments. Beall prepared the application and is providing 50% of the funds for its prosecution. He is also the only person authorized to sign checks on

behalf of the corporation. Tr. 294, 299, 302. Frank, in turn, initiated the efforts to get the instant frequency allocated to Lenoir and found the transmitter site, Tr. 259-260, 416, and is an experienced broadcaster. For his part, Respess has primarily confined his post-formation activities to areas in which his legal background has a bearing. Thus, for example, he testified that he was asked by communications counsel to assist Frank in contacting the U.S. Marshall's office to secure a subpoena for Reta Thorn because he was an attorney and neither Frank nor Beall knew who to call or what to do. Tr. 1105. Respess testified that he had informed Beall and Frank at the outset that he had no time or interest to participate in the day-to-day operation of the radio station, or the prosecution of the application, except to the extent he was asked to do so. Tr. 514. He also testified that he never attended any corporate meetings, other than the initial one in June 1989 when the principals discussed the corporation's formation. Tr. 1103. Based on the foregoing, we are unable to find any deceptive or abusive conduct that would warrant Foothills' disqualification under issue two. In light of the disqualifications of both Ochoa and Gateway, supra, we need not reach Foothills' comparative claim that it is entitled to 10% full-time and 40% part-time quantitative integration credit for the equity interests of Frank and Beall.

31. MISCELLANEOUS. Gateway notes in passing an exception to the ALJ's MO&O, FCC 91M-1604, rel. May 10, 1991, denying

its motion too add a site availability and related misrepresentation issues. The ALJ reasoned that the motion was untimely and that an option to purchase or lease agreement that Foothills relies on for its site is still in force. Foothills' opposition to the motion to enlarge also included a declaration under penalty of perjury by the site owner which avers that the site is still available. Foothills Opposition, filed April 30, 1991. The ALJ correctly denied the motion.

32. ACCORDINGLY, IT IS ORDERED, That the application of Foothills Broadcasting, Inc. (File No. BPH- 890616MR) for a construction permit for a new FM station at Lenoir, North Carolina IS GRANTED; and that the applications of Maria M. Ochoa (File No. BPH-890615ME) and Gateway Media Limited Partnership (File No. BPH-890616MN) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

CONCURRING STATEMENT OF BOARD MEMBER NORMAN B. BLUMENTHAL

In Richardson Broadcast Group, 7 FCC Rcd 1583 (1992), the Commission disqualified an applicant for "lack of candor" and "evasiveness" notwithstanding (1) that no disqualifying issue had been added or tried against that applicant;/1 and (2) that neither the ALJ nor the Board had found that applicant's conduct to be

basically disqualifying. Relying upon RKO General, Inc. v. FCC, 670 F.2d 215, the Commission disqualified that applicant after finding that its conduct warranted a terminal remedy even without an issue designed specifically to elicit that applicant's intent./2

In the case at bar, and in the wake of Richardson, my majority colleagues wrestle with the question of whether the ALJ erred in disqualifying Maria M. Ochoa without first adding a disqualifying issue. Comparing the conduct of Ochoa with that of the applicant disqualified by the Commission in Richardson, the majority concludes: "We can do no less here." Ante at para. 10.

The Commission has informed the court that:/3 an applicant may be disqualified for misconduct without a specific issue, where the misconduct occurs "before the judge's own eyes," [but] such conduct "should be of such blatant and unacceptable dimension that its existence cannot be denied."

Because I cannot find Ochoa's conduct to be any less "blatant" than that of the disqualified applicant in Richardson, I must concur with the majority's conclusion as to Ochoa.

As to Foothills Broadcasting, and in view of Commission precedent cited ante, para. 25, I find it hard to dispute the majority's resolution there as well.

FOOTNOTES TO STATEMENT

/1 In the Board's Richardson decision, it found it unnecessary to decide the question of whether a discrete issue was necessary prior to disqualification under the facts of that case because it concluded that, in any event, the applicant did not display a lack of candor anywhere near the magnitude necessary to disqualify. It did, in passing however, suggest a comparison between: Silver Star Communications- Albany, Inc., 3 FCC Rcd 6342, 6349-6350 (Rev. Bd. 1988) (Board, citing West Coast Media, Inc. v. FCC, 695 F.2d 617 (D.C. Cir. 1982), declines to find intentional misrepresentation sans issue) with WCVQ, Inc., FCC 90-224, rel. June 26, 1990 ("the truthfulness and candor of an applicant's testimony are always at issue in FCC proceedings," citing William M. Rogers, 92 FCC2d 187, 199 (1982)). See Richardson Broadcasting Group, 5 FCC Rcd 5285, 5285 & n.3 (Rev. Bd. 1990). The Commission addressed this question in its reversal of the Board in its own Richardson decision.

/2 Nancy Naleszkiewicz, 7 FCC Rcd 1797 (1092), where the Commission disagreed with the ALJ and the Board that an applicant's conduct warranted dismissal, and it remanded the proceeding back to the ALJ for a specific truthfulness issue to elicit the applicant's intent, if the All found that the evidence so warranted.

/3 Brief for Appellee at 45 (citation and footnotes omitted), LBC, Inc. v. FCC, 865 F.2d 1329 (1988).

APPENDIX E, MEMORANDUM OPINION AND ORDER, FCC 93-221, rel. May 10, 1993, 8 FCC Rcd 3135 (1993)

By the Commission:

1. We have before us an application for review of the Review Board's decision in this case, Maria M. Ochoa, 7 FCC Rcd 6569 (1992), filed by Maria M. Ochoa on November 12, 1992. The decision under appeal holds that Ochoa is disqualified for giving deceitful testimony, that Foothills Broadcasting, Inc. is not disqualified, and hence that Foothills' application should be granted. (A third applicant that was also found disqualified has filed no appeal.) Ochoa contends that the Board should have exonerated her of the charge of misrepresentation and should have found Foothills disqualified, instead./1 We disagree with Ochoa's contentions and affirm the Board's disposition of the two remaining applications.

---

/1 Foothills filed an opposition to the application for review on November 25, 1992. On December 10, Ochoa filed a motion to strike the opposition. Foothills filed an opposition to the strike motion on December 17, and Ochoa filed a motion to strike that, pleading on December 21. We will dismiss both strike motions. The first alleges that Foothills' opposition improperly contends that Ochoa did not demonstrate the reliability of her integration proposal. Because our resolution of this case involves no consideration of such a contention,

Ochoa's first motion to strike, Foothills' opposition, and Ochoa's second motion to strike are moot.

---

2. Foothills: Ochoa objects that the Board ignored allegedly false testimony by Foothills' non-voting stockholder, Wallace Respess, that he is merely a passive investor and also overlooked the alleged fact that Foothills falsely denied in its exceptions that any of its principals had ever represented that Respess is a passive and insulated investor. The portions of the record that Ochoa cites, however, reveal that these assertions are baseless. Respess did not testify at Tr. 514, as alleged, that he is a "passive investor" but rather that he had no intention of participating in daily station management, and Ochoa does not point to any proof that this testimony was fallacious. And it appears that Foothills merely stated the plain truth when it asserted in exceptions that it had never alleged that Respess was a "passive" or insulated" investor but rather that he is a non-voting stockholder who does not intend to participate in daily station management.

3. Ochoa: The other issue in contention is whether in responding to examination concerning statements to former co-workers about her intentions regarding implementation of her integration proposal, Maria Ochoa was a truthful and candid witness. Ochoa has claimed integration credit on the basis of representations that she would participate full-time in daily management of her proposed Lenoir FM station. Accordingly,

in her direct written case she pledged to quit her then-current position as sales manager of WMXC-FM, Charlotte, and move to Lenoir in the event the FCC granted her application. Id. 6569, para. 2. Opposing counsel sought to raise doubt as to the sincerity of the pledge by questioning her at the hearing about what she had told others at WMXC about her actual intentions and by presenting past and present WMXC employees as rebuttal witnesses.

4. In light of the evidence thus developed. the ALJ found that Ochoa had never intended to move to Lenoir and she deserved no integration credit. 7 FCC Rcd 1861,1866, paras. 76-78. Further, he concluded that she had testified falsely concerning her conversations with other WMXC employees. Id. at 1866 79, 1869 22. Thus, invoking the principle that it is unnecessary to formulate a hearing issue to put an applicant on notice of the duty to testify truthfully, the ALJ held that Ochoa should be disqualified for misrepresentation, notwithstanding that no misrepresentation issue had been formally specified against her. Id.23-26.

5. Ochoa argued in exceptions that she could not fairly be disqualified for the alleged misrepresentations absent previous specification of a pertinent formal hearing issue. She contended, moreover, that the ALJ had erred in finding that she had testified inconsistently about her conversations with WMXC employees concerning her Lenoir application and its bearing on her career plans. 7 FCC Rcd at 6571, para. 7, and asserted that the testimony of the rebuttal witnesses was

tainted by bias. The Board denied her appeal, confirming the finding that she had lied in testimony and agreeing with the ALJ that it is fair to disqualify her for that reason despite the absence of advance formal notification that this might be done. Id. at 6571-72, paras. 8-10. The Board affirmed the misrepresentation finding because it found that Ochoa had asserted in the first instance that she had told her former supervisors and co-workers that she would move to Lenoir if her application were granted and had later "disavowed" her testimony to that effect during her final appearance on the stand. Id. at 6571 9. The Board indicated that it did not rely on the testimony of the rebuttal witnesses, however, and hence declined to address the exceptions concerning their bias or veracity. Id. at 6572, para. 11

6. In her application for review Ochoa contends, again, that it is unfair to disqualify her based on evidence compiled in the absence of a formally-specified character issue. That argument has already been refuted for good and sufficient reason, the crux of which is that the absence of formal notice in this instance is a mere technicality, as Ochoa had actual notice that the veracity of her testimony regarding her pertinent comments to WMXC employees was at issue and had ample opportunity thereafter to adduce evidence bearing on that question. 7 FCC Rcd at 6571, paras. 8-9.

7. Ochoa's other main contentions -- that her testimony was not, in fact, self-contradictory, contrary to what the lower decisions have found, and that the conflicting testimony of the four rebuttal witnesses is not credible -- warrant comment but do not justify a change in result.

8. As to the consistency of Ochoa's testimony, there is a significant difference between the account of relevant conversations that she gave before the appearance of the rebuttal witnesses and the one she gave afterward. Her initial account, which she gave without knowing that her former associates at WMXC would be called as witnesses, was clearly more self-serving. Thwarting attempts to elicit admissions that would undermine her integration pledge, Ochoa repeatedly affirmed under cross examination at the first hearing session that she had told her supervisors at WMXC that she was proposing to leave WMXC if her Lenoir application was granted. Tr. at 82, 104. She also categorically denied having said that she never intended to work at the proposed station or that she would withdraw her application in return for payment from the other applicants in a settlement. Tr. at 113-114, 116-17. She gave no indication that she had said anything that could have caused anyone to suppose that she did not mean to carry out her integration pledge. But in redirect examination after the rebuttal witnesses had testified that she had told them that she had no intention of moving

to Lenoir, she admitted that she had deliberately lead them to believe that there was little or no chance that she would leave WMXC in order to work full-time at the Lenoir station. Tr. at 970-71, 989-90. 1002-03. In light of these discrepancies. it is plain that Ochoa's initial testimony about her remarks to her former associates was deliberately misleading. Although Ochoa quarrels with this reading of her testimony, we conclude that the Board ruled correctly in holding her disqualified.

9. In addition to arguing that her testimony was not self-contradictory, Ochoa also argues that she should not be found guilty of deceit based on the testimony of other witnesses. We disagree. Ochoa categorically denied that she had told Jake Gurley, her former supervisor, that she had no intention of moving to Lenoir because she planned to withdraw in exchange for a settlement payment or else sell the station. Tr. at 113-17. Ochoa also asserted that she had told Gurley and another supervisor, Reta Thorn, that she did intend to move to Lenoir if she got the grant. Tr. at 1005-07, 1009. This testimony is squarely contradicted by the detailed and mutually consistent testimony on point from four witnesses, which is not disputed by any witness other than Ochoa. See Tr. at 360-61, 366-68, 372, 377-79, 606, 618, 658-59, 702, and 709-10 and the testimony cited at 7 FCC Rcd 6570 5. The ALJ, who heard the impeaching testimony, plainly indicated by his findings that he found it credible, 7 FCC Rcd at 1866 77,

and that determination of credibility is not to be lightly cast aside. See Universal Camera Corp. v. NLRB, 340 U.S. 474, 496 (1950), and NLRB v. Stor-Rite Metal Products, 856 F.2d 957 (7th Cir. 1988).

10. Ochoa's attempt to pass off the contradiction as merely due to misunderstanding cannot be credited in light of the undisputed fact that all four rebuttal witnesses understood her to say, on various occasions, that she had no intention of moving to Lenoir because she planned to take a settlement payment or sell after receiving a grant. Her assertion that she had merely told them that her chance of prevailing was slim and that the proceeding would not be resolved soon is squarely belied, moreover, by testimony of Thorn and Gurley that they had pointedly asked her what she would do if she did get the grant and that she had replied that in that event she would sell the station. Tr. at 359-60, 377-78, 659, 702.

11. Ochoa argues that the testimony of those four witnesses is not to be believed because the record shows that they are biased against her. We conclude, however, that this contention is ill-founded. She asserts that the record shows that Sue Litaker disliked her. In fact, the evidence merely shows that Litaker had a poor opinion of Ochoa's performance as sales manager. Tr. at 749-51, 765-66, 768-69, 842. Whatever her feelings toward Ochoa may have been, moreover, Litaker evidently had no burning desire to testify against her: she appeared under compulsion

subpoena after having refused to testify voluntarily. Tr. at 780. Ochoa stresses that Reta Thorn "fired" her. The record shows that Thorn demoted Ochoa, prompting her to resign, which Ochoa may have resented but which did not give Thorn any clear cause to bear a grudge, and the weight of the evidence indicates that Thorn demoted Ochoa because she was dissatisfied with her performance rather than for a spiteful motive. Tr. at 121, 361-62. Moreover, Thorn, like Litaker, refused until compelled by subpoena to cooperate with counsel who solicited her testimony as a witness against Ochoa. Tr. at 376-77, 380. Ochoa asserts that Edward Jablonski disliked her, that she had tried to get him fired, and that she had prevailed upon Gurley, then the general manager, to cut Jablonski's salary in half. Ochoa cites no evidence, though, that Jablonski knew that she had asked anyone to fire him, and Jablonski and Gurley testified that the salary cut was accompanied by a raise in Jablonski's commission rate and that Jablonski expected to realize an increase in total income as a result. Tr. at 614, 713. Finally, Ochoa asserts that Gurley had been fired six months before the hearing because she had accused him of sexual harassment. In fact, there is no evidence that Gurley was fired or that Ochoa accused him of sexual harassment. The record merely shows that she threatened to sue him for "harassment and hostile environment" after he had asked her to resign or accept a demotion and that Gurley himself subsequently resigned

after being denied permission to fire her. Tr. at 689-90, 986-89. Gurley testified that he had previously decided that he would leave the company and that the falling-out with Ochoa had merely brought matters to a head, that he did not regret having given up his former position at WMXC, that he had recently praised Ochoa in conversation with her current employer, that although he no longer liked her he bore her no ill-will, and that his testimony was not skewed because of his feelings about her. Tr. at 718-19.

12. In sum, there is no persuasive evidence that Litaker or Thorn had any serious motive for bearing false witness against Ochoa, and, although Jablonski and Gurley may harbor some ill-feeling toward her as a result of past antagonism in the course of their employment at WMXC, their detailed testimony on point is facially credible and is materially corroborated by Litaker's and Thorn's. There is no reason to conclude here that four mutually corroborative witnesses with little or no apparent motive for lying all perjured themselves in testimony that the ALJ found credible when the only evidence at odds with their sworn statements is equivocal and uncorroborated testimony from a witness who had a strong self-serving motive for contradicting them and who did not her- self accuse them of lying when asked to account for the discrepancies between their testimony and hers but instead offered an implausible explanation that they had misunderstood her.

13. Aside from alleging bias, Ochoa grasps at other straws in her attempt to discredit the impeaching testimony. She asserts, citing the record, that Gurley's memory is admittedly poor, that he had no written record of his pertinent conversations with Ochoa, that his affidavit in evidence was not drafted by him but by an attorney who is a principal of another applicant, and that the affidavit was admittedly inaccurate. None of the evidence to which Ochoa thus refers is materially significant. The only acknowledged inaccuracy in the affidavit is an immaterial mis-dating of an event that it mentions. Although Gurley admitted that the affidavit was not of his own composition, he said that he had reviewed it carefully before signing it and that it was correct except for that one inaccuracy. Tr. 666, 668-69, 671. Gurley admitted that he had a poor memory for dates, but said that he had no particular difficulty in recalling events. Tr. 668-9. There is no indication that his testimony on crucial points, which is distinct and unequivocal, was skewed by faulty recollection.

14. Ochoa asserts that Sue Litaker conceded, at Tr. 748, that she had "never" heard Ochoa say that she hoped to make money from a settlement. This distorts the record. What Litaker actually says at Tr. 748 is merely that she had not heard such a remark on one particular occasion, and she says at Tr. 744-45 that she did hear Ochoa make such remarks on two other occasions.

15. Ochoa alleges, citing Tr. at 603-

07, that Jablonski conceded that Ochoa had not explicitly stated her intentions to him and that he had merely gathered an impression about them. But the concession refers to only one of two conversations with Ochoa that Jablonski mentioned, and he testified that she had explicitly told him in the other conversation that she did not intend to move to Lenoir. Tr. at 604, 606, 618. Ochoa asserts that Jablonski denied that he had ever talked to Gurley about Ochoa's Lenoir application or that he knew how Gurley might testify, but that Gurley's testimony belies these denials. Here, again, Ochoa distorts the record. Jablonski did not deny having mentioned Ochoa's application in conversations with Gurley; on the contrary, he said that they had talked about it in two instances but had not discussed its details, Tr. at 637, and his testimony in this respect is fully consistent with Gurley's. Jablonski's testimony to the effect that he did not know, when he told Gurley that Reta Thorn had been subpoenaed to testify in this case, what relevant information Gurley might have to impart is also consistent with Gurley's testimony. Tr. at 640, 672-74.

16. Ochoa asserts that Reta Thorn's testimony is self-contradictory and inconclusive, but the hearing transcript discloses that these assertions are baseless. Ochoa further contends that Thorn gave false testimony, noting that she said that she had not talked to Gurley about Ochoa's activities as a WMXC employee, whereas Gurley testified that they had discussed that subject in one

instance; Ochoa insinuates, moreover, that Thorn's testimony in this regard is further impeached by testimony by Jablonski and Gurley that Thorn had asked Jablonski to tell Gurley that she had been asked to testify against Ochoa. The portions of the record that the appellant cites as support for the latter assertion do not record any testimony to the effect that Thorn had asked Jablonski to tell Gurley anything, however, and the noted inconsistency between Thorn's testimony and Gurley's about a peripheral detail doesn't undermine their credibility.

17. Ochoa contends that reversible error was committed when the ALJ denied a motion by her attorney for issuance of a subpoena to compel testimony from Vanessa Key, another WMXC employee. We do not agree that the denial of this motion was reversible error, as Ochoa made no showing that Key could provide material evidence that could not be adduced from one of the nine other witnesses that appeared at the rebuttal session. FCC 91M-1475, rel. April 26, 1991, Tr. 783.

18. ACCORDINGLY. IT IS ORDERED that the application for review filed by Maria M. Ochoa on November 12, 1992 and Ochoa's strike motions filed on December 10 and 21, 1992 ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX F, MEMORANDUM OPINION AND ORDER, FCC 93-526, rel. Dec. 28, 1993, 9 FCC Rcd 56 (1993)

By the Commission:

1. Maria M. Ochoa has filed a petition for reconsideration of our affirmance of the Review Board's decision that she is disqualified for testifying deceitfully and that the competing application of Foothills Broadcasting, Inc. should be granted. Maria M. Ochoa, 8 FCC Rcd 3135 (1993)./1 She has also filed four motions to reopen the record and add hearing issues concerning Foothills' basic qualifications./2 We will deny the petition for reconsideration, but two of the petitions to reopen raise questions that warrant further investigation. We will therefore add hearing issues and remand the case for further proceedings.

I. The Petition for Reconsideration

A. The veracity of Foothills' representations about the role of Respess

2. The Review Board held that the interest of Foothills' non-voting stockholder, Wallace Respess, who did not propose to be integrated in daily station management, would have to be taken into account for purposes of calculating integration credit because of his assistance in the prosecution of Foothills' application. 7 FCC Rcd 6569, at 6575, para. 29 (Rev. Bd. 1992). On the other hand, though, the Board held that

/1 Ochoa filed the petition for reconsideration on June 9, 1993. Foothills filed an opposition on June 23, 1993 and a corrected opposition on June 28. Ochoa filed a reply on July 6, 1993.

/2 Ochoa filed the first motion to reopen and enlarge on June 15, 1993. Foothills filed an opposition thereto on June 30. On July 13, Ochoa concurrently filed a reply to the opposition and a motion to strike the opposition because it lacked a summary. Foothills filed an opposition to the strike motion and a summary for its June 30 opposition on July 16. On August 9, Ochoa filed a motion to strike the opposition to its strike motion of July 13, asserting, inter alia, that the opposition contained matter that was not germane to the prior strike motion. Ochoa filed the second motion to reopen and enlarge on July 15, 1993. Foothills filed an opposition to that petition on July 28, and Ochoa filed a reply on August 9. Ochoa filed the third motion to reopen and enlarge on August 16, 1993. Foothills filed an opposition to it on August 25, and Ochoa filed a reply on September 7. Ochoa filed the fourth motion to reopen and enlarge on November 26, 1993.

---

the evidence did not support a finding that Foothills' principals had tried to deceive the Commission as to the nature of Mr. Respess's activities on its behalf or as to the nature of his prospective involvement in station operation. Id. at 29-30. In her application for review, the

petitioner argued that the Board should have found Foothills disqualified for misrepresentation because, according to her: (1) Respess had testified that he was a "passive" investor, and this testimony was belied by the evidence of his involvement in prosecution, and (2) Foothills had falsely denied having ever alleged that Respess was a passive and "insulated" investor. We affirmed the Board's resolution of the misrepresentation question, pointing out that Respess had not, in fact, testified that he was a "passive" owner, but rather that he did not plan to participate in day-to-day station management. We found, moreover, that Foothills had not, in fact, alleged that Respess was a passive and insulated investor and hence that there was no basis for the petitioner's second misrepresentation charge. 8 FCC Rcd at 3135, para. 2.

3. Mrs. Ochoa now contends that we ignored a hearing exhibit disclosing that Foothills' application contains a certification statement that is semantically equivalent to an allegation that Respess was a "passive and insulated" investor, and she further contends that Foothills' principals likewise represented in deposition testimony that he was passive and insulated. We continue to believe, as did the Board, however, that there is no basis for finding that the certification statement was a misrepresentation. See id. at 29. The partial deposition transcript that the petitioner has submitted, moreover, does not record any testimony to the effect

that Respess was a passive and insulated investor.

4. The petitioner also asserts that a written statement obtained recently from an individual named Allen R. Hennessee proves that Respess, contrary to his testimony, would be involved in daily station management. Hennessee's statement merely indicates that Respess contacted him on Foothills' behalf as to the possibility of securing a right-of-way across his property for access to its transmitter site. Thus, there is, again, no showing of an inconsistency with Foothills' assertion that Respess will not participate in day-to-day station management.

B. The Holding that Ochoa is Disqualified for Misrepresentation

5. We found from discrepancies in her own testimony that the petitioner had been less than candid in responding in the initial hearing session to cross-examination concerning her remarks to supervisors and co-workers as to whether she actually intended to carry out her proposal to move to Lenoir and manage a new FM station there. She repeatedly affirmed at the first session that she had told her supervisors that she was proposing to move to Lenoir if her application were to be granted and denied having told them that she did not really intend to carry out that ostensible plan. But after opposing counsel elicited impeaching testimony from four of her former supervisors and co-workers, she

conceded that she had deliberately lead them to believe that there was little likelihood that she would ever quit her current job and move to Lenoir. 8 FCC Rcd at 3136

8. Furthermore, we found in light of the impeaching testimony that the petitioner had lied outright in (1) denying that she had told a former supervisor, Jake Gurley, that she had no intention of moving to Lenoir and planned instead to drop her application in exchange for a settlement payment or else sell out after securing a construction permit and (2) in testifying that she had told Gurley and another former supervisor, Reta Thorn, that she did intend to move to Lenoir if she got a construction permit. Id. at 9.

6. The petitioner maintains that our affirmance of the holding that she is disqualified for misrepresentation goes against requirements of due process and is contrary to the evidence. Some of her arguments merely repeat objections to which we have already spoken, ignoring the reasons that we gave for rejecting them; there is no need for us to respond specifically to such contentions. See WWIZ, Inc., 37 FCC 685 (1964), aff'd sub nom. Lorain Journal Co. v. FCC, 351 F.2d 824 (D.C. Cir. 1965), cert. den., 383 U.S. 967 (1966).

7. Miscellaneous objections: The petitioner complains that we ignored evidence that she really does intend to move to Lenoir in the event of receiving a construction permit. We did not mention that evidence because it had no material

bearing on the misrepresentation issue, which does not go directly to the veracity of her integration pledge but rather to the veracity of her testimony as to what she told certain people. Whatever her actual plans may have been, she had compelling motives, by her own admission, for leading those persons to believe that she would never move to Lenoir. 7 FCC Rcd at 1866 75.

8. The petitioner disputes our assertion that the ALJ indicated that he found the impeaching testimony credible, 8 FCC Rcd at 3136 9, but the assertion is correct. The findings in 77 of the initial decision necessarily imply that the impeaching testimony was credible, as there is no evidentiary basis for those findings aside from that testimony, which testimony the ALJ recounted in detail elsewhere in his decision. The petitioner next contends that we erred in dismissing her motion to strike Foothills' opposition to her application for review, which assertedly raised new arguments that could not be fairly considered. Id. at 3135, n.1. As she does not allege that we relied on any of those arguments, however, it has not been shown that the ruling was prejudicial.

9. The petitioner also complains of racial and sexual discrimination in violation of the U.S. Constitution. She bases the accusation on the premise that we have treated her, a minority woman, and Foothills in a disparate manner, allegedly straining to find her guilty of misrepresentation while discounting proof that Foothills' principals, who are white

and male, are guilty of similar offenses. We see no merit in this contention. We affirmed the denial of the petitioners application because the evidence clearly establishes that she repeatedly lied about material facts in hearing testimony, whereas she failed to show that there were grounds for reversing the Board's favorable resolution of the previously specified misrepresentation issue against Foothills.

10. Argument concerning procedural fairness: The petitioner argued in her application for review that she could not properly be found disqualified, inasmuch as no pertinent misrepresentation issue had been formally specified. We held, in agreement with the Board, that the absence of a formally specified issue was only a technicality, because the petitioner had actual notice that findings would be made as to the veracity of her testimony about her statements to former supervisors and co-workers and had ample opportunity after this became obvious to adduce evidence bearing on that question. Id. at 3136, para. 6. She now contends, however, that Commission policy and the Administrative Procedure Act bar us from finding her disqualified for misrepresentation based on evidence received in the absence of a formally specified misrepresentation issue. She adds that the misrepresentation finding was unfair not only because of the absence of formal specification of the issue but also because there was no explicit allocation of the pertinent burdens of proceeding and proof. Furthermore, the

petitioner disputes the premise that she had actual notice that she was at risk of disqualification, alleging that she was lulled into believing otherwise by remarks by the ALJ at the end of the hearing that supposedly indicated that he was (as she puts it) "satisfied with [her] testimony."

11. It is well-settled that applicants may properly be disqualified for lying in hearing testimony in the absence of previous formal notification that findings would be made as to whether the testimony was deceitful. See RKO General, Inc. v. FCC, 670 F.2d 215, 235 (D.C. Cir. 1981), and Richardson Broadcast Group, 7 FCC Rcd 1583, 1585, para. 9 (1992), aff'd sub nom. Younts v. FCC, No. 92-1119 (D.C. Cir., May 10, 1993). RKO holds that such action may be warranted provided that: (a) the misconduct before the agency is so blatant that its existence cannot be denied; (b) the disqualified party had some form of prior actual notice and was not prejudiced by surprise; and (c) the disqualified party was afforded an opportunity to defend against the charge. All three conditions were clearly met in this instance.

12. The petitioner's complaint that she is a victim of "trial by ambush" is belied by the record. The ALJ made it clear during the hearing that the discrepancies between the petitioner's testimony and that of the four impeaching witnesses (Reta Thorn, Jake Gurley, Sue Litaker, and Edward Jablonski) were decisionally significant and that findings would be

made as to whether she had testified truthfully in this regard; she was permitted to present further testimony of her own on point after having heard the impeaching testimony; and she was afforded ample opportunity to cross-examine those witnesses and call others to discredit them or corroborate her own version of the facts. The petitioner and her counsel demonstrated at the rebuttal session, moreover, that they were alert to the implications of the conflict between her initial testimony and the contrary testimony of those others. Her counsel tried to discredit the impeaching witnesses by developing evidence of bias, and she tried to explain away the discrepancies by suggesting that they had all misunderstood her./3

13. How the burden of proceeding should have been assigned is entirely academic at this point, as the record indisputably contains prima facie evidence that Mrs. Ochoa lied in the testimony in question. Nor does it matter who is chargeable with the burden of proof, as her guilt is established by more than a bare preponderance of the evidence.

14. Objection to denial of a request for subpoena: The petitioner contends that the ALJ committed reversible error by denying a motion to subpoena another WMXC-FM employee, Vanessa Keys, who was allegedly "the only disinterested person to the conversations in question." In denying the motion, the ALJ found that the petitioner had made no showing that Keys' testimony would be "an essential plank in Ochoa's

version of the facts" or would include information that could not be obtained from one of the nine witnesses already scheduled to appear at the rebuttal session. FCC 91M-1475 (rel. 4-26-91)./4 There is nothing before us that indicates that he was mistaken in that finding. The petitioner has not alleged that Keys would have materially contradicted any of the impeaching witnesses concerning the petitioner's remarks to them about her intentions. In renewing the request at the rebuttal session, petitioner's counsel merely said that Key would testify that Sue Litaker disliked the petitioner. Tr. at 783. Although relevant, such testimony would have been essentially cumulative. See Tr. at 766-69 and 840-42. In short, it has not been shown that the ALJ erred in thus exercising his discretion under 47 C.F.R. 1.243 and 1.352.

15. Credibility of the impeaching testimony: In our previous ruling in this case we rejected as ill-founded the petitioner's argument that the impeaching testimony of Gurley, Thorn, Litaker, and Jablonski is unreliable due to bias. 8 FCC Rcd at 3136, paras. 11-12. The petitioner contends that we reached this holding based on erroneous findings and without considering important evidence. In particular, she asserts, inter alia, that we overlooked evidence that: (a) Gurley was fired after the petitioner had accused him of sexual harassment; (b) the WMXC-FM staff was sharply divided after Gurley's departure into pro-Gurley and pro-Ochoa factions and Litaker and Jablonski were

both solidly in the pro-Gurley, anti-Ochoa camp; (c) Jablonski referred to persons in sympathy with the petitioner as "the enemy"; (d) Jablonski knew that the petitioner had tried to have him fired; (e) Litaker revealed to a fellow employee that she was eager to testify against the petitioner; and (f) Gurley, Thorn, Litaker, and Jablonski discussed their testimony with each other before the hearing. The petitioner contends, moreover, that there is no material discrepancy between her testimony and Litaker's testimony that she had heard the petitioner say that she hoped to make money from a settlement. Further, the

---

/3 The remarks at Tr. 1018-19 that the petitioner cites as proof that the ALJ indicated at the hearing's conclusion that he believed her, do not, in fact, imply that he was satisfied that she had been entirely honest in her testimony about her statements to supervisors and co-workers. In any case, nothing that he might have said at the end of the hearing could have hindered or dissuaded her from developing evidence in her favor while the hearing was in progress. Although he said in an order issued prior to the rebuttal session that "a narrow comparative point" ("namely, whether Maria Ochoa really intends to move to Lenoir") was at issue, this did not relieve her of the risk, made clear by settled precedent, of disqualification for testifying deceitfully. The record of the rebuttal session shows that she was aware of that

risk and attempted to overcome it.

/4 The ALJ evidently also regarded the motion to subpoena Vanessa Key as untimely, as it was filed only one week before the scheduled commencement of the rebuttal session. He had previously issued two subpoenas for the rebuttal session on the petitioner's behalf.

---

petitioner maintains that we erred in holding that an inconsistency between Thorn's and Gurley's testimony is immaterial.

16. Many of these assertions are incorrect or misleading. To begin with, Litaker did not merely testify that she had heard the petitioner say that she hoped to make money from a settlement. According to Litaker's testimony, the petitioner made it perfectly clear by her remarks to Litaker and others on two occasions that she had no intention of constructing and operating an FM station in Lenoir. Tr. at 743-45. We also reaffirm our conclusion as to the insignificance of the discrepancy between Thorn's and Gurley's testimony as to whether they had ever talked to each other about the petitioner. See 8 FCC Rcd at 3137, para. 16. As there is no evidence that they said anything to each other about the petitioner of any material relevance to this proceeding, there is no support for a finding that Thorn deceitfully denied recalling a conversation concerning her in order to avoid arousing suspicion that Gurley had

incited her to testify against the petitioner.

17. None of the evidence that the petitioner cites indicates that any of the impeaching witnesses ever told one another how they intended to testify. It appears that Gurley told Jablonski that the petitioner had no intention of operating a Lenoir FM station and that Jablonski therefore had reason to assume that Gurley would so testify, Tr. at 673- 74, but this does not raise any material question about the veracity of either's testimony. It also appears that Sue Litaker told Karen Barnes that the petitioner had testified falsely and that she, Litaker, was going to contradict her and "make sure that [the truth] came out." Tr. at 843. This lends no support to the petitioner's theory that the four impeaching witnesses conspired together to supply testimony against her, however, as Barnes was one of the petitioner's own witnesses, nor does the reputed remark betray any intent on Litaker's part to testify falsely.

18. Contrary to the petitioner's contention, none of the evidence that she cites shows that Jablonski knew that she wanted him fired. The petitioner also exaggerates the importance of Karen Barnes' testimony about Jablonski's calling her "the enemy." It appears that on encountering Jablonski on the airplane on the way to Washington, D.C. to testify in this proceeding, Barnes invited him to sit with her and that Jablonski replied facetiously that he shouldn't sit with the enemy -- meaning that it was better that

they not sit together because they had been called to testify by opposing litigants. Barnes admitted that the remark had not been malicious. Tr. at 635 and 849.

19. Contrary to our previous finding, 8 FCC Rcd at 3136, para. 11, there is some evidence that Gurley was fired in the wake of his falling out with the petitioner, but there is also evidence that he merely resigned, which the petitioner fails to acknowledge. Tr. at 119, 690, 911, 1003, and 1072. It appears, moreover, that Gurley, Jablonski, Litaker, and Thorn. among others, had a poor opinion of the petitioner's performance as sales manager, that there was considerable antagonism between the petitioner and Gurley, Jablonski, and Litaker during her tenure in that position, and that the petitioner may have persuaded officers of the licensee of WMXC-FM to fire Gurley or press him to resign. It is not clear, however, that the petitioner caused any serious harm to Jablonski's interests, and there is no evidence that she ever did any injury to Litaker or Thorn. Nor is there any evidence that there was any overt antagonism between Thorn and the petitioner; on the contrary, the petitioner testified that she had no problem in getting along with Thorn. Tr. at 121. And despite the petitioner's assiduous efforts to highlight their supposed biases, it is not evident that any of the impeaching witnesses had an ulterior motive for testifying against her that was nearly as compelling as her own

obvious motives of self-interest for denying before this agency that she had uttered the crucial remarks that they attributed to her. In sum, as we held before, there is no reasonable basis for disregarding the plausible and mutually corroborative testimony of these witnesses on the theory that they conspired to commit perjury for spiteful motives. 8 FCC Rcd at 3137, para. 12./5

II. Ochoa's Petitions to Add a Transmitter Site Suitability Issue and Related Misrepresentation and Concealment Issues against Foothills

20. On June 15, 1993, Mrs. Ochoa filed a petition to enlarge and reopen based on a declaration by Allen R. Hennessee dated May 31, 1993. The declaration alleges that on learning that Steve Frank (one of Foothills' principals) had spoken to the declarant's father-in-law, Arvil Greene, in 1989 about securing a transmitter site on Warrior Mountain and that the access road to the site crossed the declarant's property, the declarant had told Frank that he would not permit Foothills to use the road and had sent him a written statement to that effect approximately 60 days later. The declaration further alleges that in May 1993 Frank and Wallace Respess, another Foothills principal, had asked the declarant to reconsider but that he had reaffirmed his previous refusal and that Mr. Respess had told the declarant that as far as he knew there was no way of getting to the site except via the road

through his land. The petitioner therefore urges that additional hearing issues specified as to whether Foothills lacks access to its transmitter site, whether it misrepresented the availability or

---

/5 Insofar it requests that the testimony of Reta Thorn be stricken from the record or that the record be re-opened for the purpose of re- evaluating Thorn's testimony against Ochoa, Ochoa's fourth motion to reopen will be denied. Ochoa bases her request for such relief on recently-discovered evidence that Thorn is now employed by Foothills as the manager of its newly operational Lenoir FM station, contending that this information suggests that Thorn was not an impartial witness. No showing has been made that any communication concerning job opportunities passed between Thorn and Foothills before Thorn testified, however, and even if her testimony were to be discounted the preponderance of the evidence mentioned here and in the decision that we are reaffirming would still support the conclusion that Ochoa is disqualified for deceit.

---

suitability of its site in certifying its application, whether it violated 1.65 of the Commission's rules by failing to report Hennessee's refusal to grant a right-of-way, and whether in withholding Hennessee's 1989 refusal letter Foothills violated the ALJ's standard document production order, which required the

parties to exchange all documents relating to their transmitter sites on December 24, 1990.

21. In response, Foothills has submitted an affidavit by Steve Frank alleging that Arvil Greene, who then owned a tract of land adjoining the one where Foothills proposes to install its transmitter, told the affiant that he could use the private road across his property for access to the site. Frank also says in the affidavit that on learning early in 1991 that Greene had conveyed his tract on Warrior Mountain to Hennessee, he had asked Hennessee for permission to use the road; that Hennessee refused permission and sent him a written statement to that effect a week or two later, which the affiant received on February 27, 1991; that the affiant then spoke to other landowners about gaining access to the site and on March 7, 1991 secured from Clyde Keyes, the owner of another tract abutting the ridge line of Warrior Mountain, consent for Foothills to establish an access road to the site across his property.

22. In support of these assertions, Foothills has submitted Hennessee's February 27, 1991 refusal statement and a March 7, 1991 declaration from Clyde Keyes which states that the declarant owns a tract extending from a public road to the existing ridgeline road along the crest of Warrior Mountain and would allow Foothills to cut a road across his property to the ridge line for access to its transmitter site. Foothills has also submitted a June 28, 1993, affidavit from Respess which:

denies that the affiant told Hennessee that the road through his property was the only means of access to the transmitter site; alleges that after speaking with Hennessee the affiant learned that Steve Frank had concluded years before that an adequate access trail to the site could be made without crossing Hennessee's land and that the affiant has since verified this; and that the affiant has contacted several people concerning the matter and is currently securing rights for construction of a road to the site./6

23. In her third motion to reopen, filed on August 16, 1993, the petitioner requests that a hearing issue be specified as to whether Foothills has tried to deceive the Commission by representing that it had assurance of a right-of-way through Clyde Keyes' property. She bases

---

/6 In the second of her three motions to reopen, the petitioner contends that there is a discrepancy between Respess's June 28 affidavit and statements by Foothills' principals at a prehearing deposition session and that the discrepancy raises a serious misrepresentation issue. More specifically, the petitioner refers to Respess's averral that "from time-to-time since the Foothills application was filed in 1989 . . . I have assisted . . . in various tasks in establishing the new radio station." According to the petitioner, this statement directly contradicts statements that Respess and

his partners made at a deposition session held on February 6, 1991, in which they said that Respess had little to do with the prosecution of Foothills' application aside from participating in settlement negotiations in one instance. We do not find any material inconsistency between the affidavit and the cited deposition testimony. Nothing that Respess says in the affidavit indicates that he contributed anything more to prosecution of the application prior to February 6, 1991 than the deposition testimony represents. We will therefore deny the second motion to reopen.

---

the motion on an August 5, 1993 affidavit in which Keyes avers that when he signed his declaration of March 7, 1991 giving consent for Foothills to build a road through his land he believed that Foothills intended to purchase a portion of his land for its transmitter site and that he had no intention of permitting it to enter his property in order to gain access to a site on someone else's land. The affiant also avers that his tract on Warrior Mountain does not adjoin the tract belonging to Gerald Bolick where Foothills proposes to situate its transmitter.

24. In response to the petitioner's August 16 motion, Foothills has submitted an August 19, 1993 affidavit from Respess. He alleges that Foothills has secured all permission necessary for construction of an access road to its transmitter site,

has already built the road, and has entered into a contract to purchase the land that the road traverses. He also alleges that the road provides a more suitable means of access than would have been available through Hennessee's or Keyes' property and that, in any event, other options were available.

25. Discussion: Having specified a transmitter site that could not be reached without crossing private property under the control of persons other than the owner of the site itself, Foothills could not properly have certified that the site was available to it for the intended purpose unless its principals then had reasonable grounds to believe that necessary rights of access were obtainable. If, therefore, its principals later became aware of circumstances that deprived them of reasonable assurance of such a right-of- way, they were obliged to report this to the Commission within 30 days, pursuant to 47 C.F.R. 1.65. It appears that Foothills had colorable grounds for assuming at the time of certification that a suitable right-of-way was obtainable,/7 but its primary basis of assurance was negated when Hennessee first informed Frank that he would not permit Foothills to use the road across his property. As Hennessee has sworn that this occurred some 60 days before he gave Frank the written refusal of February 27, 1991, and as Frank avers that he obtained the declaration from Keyes on March 7, 1991, a question is presented as to whether Foothills lacked reasonable assurance of access for more than 30 days without

reporting this to the Commission, in violation of 1.65. As the contradiction between Frank's and Hennessee's sworn statements concerning the amount of time that elapsed between Hennessee's oral refusal and his transmission of the written refusal to Frank have a material bearing on this matter, moreover, a further question is presented as to whether Frank tried to deceive the FCC by representing in his June 25, 1993 affidavit that the interval was less than 30 days in order to avoid arousing suspicion that Foothills had violated the reporting rule.

26. Other misrepresentation questions are presented in light of Keyes' August 5, 1993 affidavit. Keyes' averral that the land that he owns does not adjoin that of Gerald Bolick, where Foothills proposes to place its transmitter, contradicts statements in Foothills' opposition pleading of June 30, 1993, in Frank's supporting affidavit of June 25, 1993, and in the "Summary" that Foothills filed with its opposition to a strike motion on July 16, 1993. Foothills plainly represented in the "Summary" and in paras. 8, 9, and 17 of its June 30 opposition that Frank had secured assurance of access to its site from Clyde Keyes, and Frank's June 25 affidavit indicated the same thing at para. 9. Although the petitioner has called attention to this discrepancy, Foothills offers no explanation for it. Had it disclosed that Keyes' property does not extend all the way to the Bolick tract, Foothills could not have presented his 1991 affidavit as prima facie proof

that it had secured assurance of access after receiving Hennessee's rejection notice. Finally, as Foothills has offered no response to it, Keyes' averral that he predicated his erstwhile intention to grant a right-of-way on an understanding that Foothills would purchase part of his land raises a question as to whether Foothills knew all along that it could not rely on his promise and whether it tried to deceive the Commission by representing otherwise.

27. On the other hand, the contention that Foothills disobeyed the ALJ's document production order is ill-founded. Contrary to the petitioner's assertion, the order had no application to documents created after the specified production date, December 24, 1990, and Foothills did not violate the order by withholding Hennessee's February 27, 1991 declaration or Keyes' declaration of March 7, 1991. We therefore decline to add the abuse of discovery issue./8

28. ACCORDINGLY, IT IS ORDERED that the petition for reconsideration that Ochoa filed on June 9, 1993 and the motion to enlarge and reopen that she filed on July 15, 1993 ARE DENIED; that the motions to enlarge and reopen that she filed on June 15 and August 16, 1993 ARE GRANTED to the extent indicated in the foregoing opinion; and that this proceeding IS REMANDED to ALJ Walter C. Miller for further evidentiary hearing and issuance of a Supplemental Decision on the following issues:/9

(a) Whether Foothills Broadcasting, Inc. and/or Steve Frank attempted to deceive the Commission by representing, in an opposition pleading filed on June 30, 1993 and an attached affidavit and in the "Summary" filed on July 16, 1993 as an attachment to an opposition to a strike motion, that Mr. Frank had secured assurance of access to Foothills' proposed transmitter site by procuring a declaration of consent from Clyde Keyes;

(b) Whether Steve Frank and/or Foothills misrepresented, in a pleading filed with the Commission on June 30, 1993, the duration of the interval between the communication of Hennessee's oral and written notices of refusal;

(c) Whether Foothills lost reasonable assurance of access to its proposed transmitter site for more than 30 days and violated 47 C.F.R. 1.65 by failing to report this; and (d) In light of the evidence adduced under the foregoing issues, whether Foothills is qualified to be a licensee.

(e) In light of the evidence adduced under issues (a) and (b), whether a forfeiture penalty should be assessed against Foothills pursuant to 47 U.S.C. 503, subsections (b)(1), (b)(2)(A), and (b)(3), 47 C.F.R. 1.80, subsections (b) and (g), and 47 C.F.R. 1.229(f) for violation(s) of 47 C.F.R. 1.17, in an amount of up to $25,000 for each violation.

29. IT IS FURTHER ORDERED that Foothills shall bear the burdens of proceeding and proof with respect to the new issues./10

30. IT IS FURTHER ORDERED that the unopposed motion for acceptance of reprinted pleading that Foothills filed on June 28, 1993 IS GRANTED, that the motion to strike that Ochoa filed on July 13, 1993 IS DENIED, and that the motion to strike that Ochoa filed on August 9, 1993 IS GRANTED insofar as it requests that the second and third numbered paragraphs of Foothills' opposition to the July 13 strike motion be stricken as unresponsive.

31. IT IS FURTHER ORDERED that the motion to reopen and enlarge issues that Ochoa filed on November 26, 1993 IS DENIED IN PART, as explained in footnote 5, above, and that the motion is otherwise referred to ALJ Walter C. Miller for disposition in conjunction with the remand hearing here ordered.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton, Acting Secretary

---

/7 Although Hennessee's affidavit could be read to mean that he told Frank in 1989 that he would not grant a right-of-way, it seems that he did not actually do so until late December of 1990, at the earliest. It has been demonstrated without dispute that Hennessee signed the written refusal on February 27, 1991,and he has averred that the oral refusal preceded the written one by (only) about 60 days.

/8 As for the fourth motion to reopen, which arrived just as we reached a consensus concerning disposition of the

other pending pleadings, we think that it would best serve the interests of administrative convenience and expedition to refer it to the presiding ALJ for consideration (insofar as it requests addition of misrepresentation, reporting, candor, abuse of process, and forfeiture liability issues against Foothills based on information concerning implementation of Foothills' integration proposal and the identity of the managerial staff at its new broadcast station) rather than postpone disposition of the petition for reconsideration once more pending the close of yet another pleading cycle.

/9 The showing in Ochoa's third motion to reopen as to the veracity of Foothills' representations that it secured assurance of access from Clyde Keyes satisfies the three prerequisites for granting such motions that we set forth in Eve Ackerman, 8 FCC Rcd 4205, para. 6 (1993). As it is therefore necessary to reopen the record and remand for a further hearing on a misrepresentation issue against Foothills, in any event, we have specified other, closely-related issues against it that were raised by Ochoa's first motion to reopen, without deciding whether that motion, too, would have met Ackerman's diligence criterion.

/10 Any motion for discovery consistent with the requirements of 47 C.F.R. 1.229(e) shall be filed with the ALJ within 10 days from the release date of this opinion and order.

APPENDIX G, ORDER, FCC 94-337, rel. Jan. 6, 1995, 10 FCC Rcd 142 (1995)

By the Commission;

1. This order dismisses as repetitious a Petition for Reconsideration filed January 27, 1994 by Maria M. Ochoa./1 In Maria M. Ochoa, 8 FCC Rcd 3135 (1993), the Commission found that Ochoa was not qualified to be a licensee and affirmed the Review Board's denial of her application. 7 FCC Rcd 6569 (Rev. Bd. 1992). Subsequently, the Commission denied a petition for reconsideration filed by Ochoa, but remanded for further proceedings concerning the qualifications of Foothills Broadcasting, Inc. 9 FCC Rcd 56 (1993). Ochoa now seeks reconsideration of the order denying her previous petition for reconsideration.

2. Ochoa argues that the Commission erred in relying on a witness who was biased because Ochoa had caused his salary to be cut and because he had a close relationship with a competing applicant. She further asserts that the Commission engaged in a post hoc rationalization concerning the ALJ's refusal to allow Ochoa to call a rebuttal witness. Ochoa also contends that the Commission should consider her arguments because, in light of the remand proceedings involving Foothills, the time is not yet ripe for her to appeal her disqualification in this proceeding. Foothills asserts that Ochoa's principal arguments were previously considered and rejected by the Commission, and that Ochoa's second petition for

reconsideration should be dismissed.

3. The Commission previously denied a Petition for Reconsideration filed by Ochoa. Ochoa's instant petition is an unauthorized pleading which will be dismissed as repetitious pursuant to 47 C.F.R. 1.106(k)(3). Its current arguments concern matters that have already been fully considered in the Commission's decision and order denying reconsideration. 8 FCC Rcd at 3136-37, paras. 11-12, 17 and 9 FCC Rcd at 58 n. 4. Ochoa's procedural argument is also without merit. She has exhausted her administrative remedies, and the time for appeal is now ripe. Warren Price Communications, Inc., 7 FCC Rcd 6850 n.1 (1993). Ochoa also continues to have standing to participate with respect to the Foothills remand proceedings as long as she pursues her appellate rights concerning the denial of her application.

4. ACCORDINGLY IT IS ORDERED, That the Petition for Reconsideration filed January 27, 1994 by Maria M. Ochoa IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

/1 Also before the Commission are an Opposition, filed February 7, 1994 by Foothills Broadcasting, Inc. and a reply filed February 17, 1994 by Ochoa.

APPENDIX H, ORDER, FCC 95-340, rel. August 16, 1995, 10 FCC Rcd 8746 (1995)

By the Commission:

1. Before the Commission for consideration is the Review Board's Decision in this proceeding, 10 FCC Rcd 4324 (Rev. Bd. 1995), an Application for Review, filed April 27, 1995, by Maria M. Ochoa, and an Opposition, filed May 12, 1995, by Foothills Broadcasting, Inc. Having carefully considered the matters of record herein, we agree with the Board's disposition of the case and affirm its Decision.

2. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. 1.115 (g), the Application for Review, filed April 27, 1995, by Maria M. Ochoa IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton, Acting Secretary

APPENDIX I, JUDGMENT, U.S. COURT OF APPEALS, D.C. CIRCUIT, Case No. 95-1092 and Consolidated Case No. 95-1444, filed September 23, 1996

On Appeals from a Decision of the Federal Communications Commission

Before: WALD, WILLIAMS, and GINSBURG, Circuit Judges.

JUDGMENT

These causes came to be heard on notice of appeal of a Decision of the Federal Communications Commission, and were briefed and argued by counsel. The issues have been accorded full consideration by the Court and occasion no need for a published opinion. See, D.C. Cir. Rule 36(c). For the reasons stated in the accompanying Memorandum it is

ORDERED and ADJUDGED, by the Court, that in Nos. 95-1092 and 95-1444, the Decision of the Federal Communications Commission is affirmed.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely-filed petition for rehearing. See, D.C. Cir. Rule 41(a).

FOR THE COURT:
Mark J. Langer, Clerk

BY: Deputy Clerk

MEMORANDUM

Maria M. Ochoa appeals from a Decision by the Federal Communications Commission ("FCC") Review Board affirming the disqualification of her application for a license to run an FM-radio station in Lenoir, North Carolina. The Administrative Law Judge ("ALJ) who presided over the evidentiary hearing, in which competing applications for the station license were examined, disqualified Ochoa after a special hearing called to consider rebuttal testimony to statements made by Ochoa in direct examination revealed that Ochoa had engaged in misrepresentation and prevarication under oath. The ALJ disqualified Ochoa without designating a specific character issue against her, finding that such a designation was unnecessary since "[an implicit character issue exists with respect to the truth and veracity of every witness who is a principal in a hearing case." Maria M. Ochoa, 7 F.C.C. Rcd 1861, 1866, para. 82 (ALJ 1992). Following Ochoa's disqualification, the station license was granted to another applicant, Foothills Broadcasting ("Foothills"). In addition to challenging the FCC's decision to disqualify her without designating a specific character issue, appellant Ochoa claims that her disqualification was invalid because the FCC applied disparate standards to her application and Foothills' application with regard to misrepresentation and lack of candor. Finally, she challenges the FCC's grant of

the license to Foothills, also on the grounds that the FCC improperly applied disparate standards to the two applicants. We affirm the Review Board's decision to uphold the ALJ's decision to disqualify Ochoa for lack of candor without designating a specific character issue. Moreover, we find that Ochoa failed to produce any significant evidence that the FCC applied disparate standards to the applications of Foothills and Ochoa. For that reason, appellant also lacks standing to challenge the FCC's grant of the station license to Foothills.

At the time of her application for the Lenoir license, appellant was employed as a general sales manager at Station WMXC-FM in Charlotte, North Carolina. In order to gain an advantage in the license competition, she pledged to leave WMXC if her application were granted, to move to Lenoir, and to manage the new station full time. The FCC looked favorably upon applicants who proposed to integrate their ownership with the on-site daily management of the station at issue. 1/

During the course of an evidentiary hearing, in which three of the original eight applicants for the station participated (the other five having been dismissed early in the proceedings), Ochoa claimed that she had told her co-workers at WMXC of her commitment to move to Lenoir if she were granted the license. On cross-examination, she specifically denied ever telling the general manager of WMXC, Jake Gurley, that she actually

intended to dismiss her application in exchange for a monetary settlement, or that, if her application were granted, she would sell the station. See, Transcript ("Tr.") 82,113-17. Appellant was shown a sworn statement in which Gurley contradicted her testimony, but she did not alter her testimony. Tr. 116-17. 2/

As a result of this sharp conflict in testimony, the ALJ scheduled an extraordinary hearing session for the taking of rebuttal testimony. Tr. 240-43, 433-36, 582. At the outset of the rebuttal hearing, the ALJ made clear that the purpose of the hearing was to resolve the contradictions in testimony, and he called upon counsel for both parties to provide additional information:

---

1/ See, Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393, 395 (1965) (explaining the pro-integration policy that was in effect at the time of Ochoa's application).

2/ At the initial evidentiary hearing, Ochoa also denied telling Reta Thorn, general manager at WMXC, that she had no plans of moving to Lenoir to manage the new station. See, Tr. 104. Yet, Thorn later testified at the rebuttal hearing that Ochoa had made statements to her indicating that she did not plan to leave her job at WMXC in the event her application were granted. Tr. 359-60.

---

JUDGE MILLER: ... [W]e are here today to take the rebuttal testimony on integration representation set out at page 2 of Ochoa Exhibit 1. That representation reads: "Ochoa proposes to move to Lenoir in the event of grant of her construction permit."

We have already had some testimony regarding that representation. We have Reta Thorn's testimony and we have some testimony from Maria Ochoa.

That testimony, as I read it, is directly contradictory. I have gone over it again to be sure that is so. Consequently, I granted Mr. Bernard's rebuttal request and, also, called on Mr. Yelverton [Ochoa's counsel] to make any further showing regarding that representation that he felt was necessary, and that's what we are going to do this session. Tr. 582.

During the course of the rebuttal hearing, Jake Gurley and three other WMXC employees all testified that Ochoa had told them that she would not leave WMXC as a result of the FCC licensing proceedings. Tr. 359-61, 368, 372-73, 377-78 (Reta Thorn), Tr. 603-06 (Edward Jablonski), Tr. 653-54, 659 (Jake Gurley), Tr. 743-44 (Susan Litaker). Ochoa called four opposing witnesses, who testified that Ochoa said she would in fact move to Lenoir if the license were granted, but did not say anything about what she had told her co-workers about her intentions.

After hearing the damaging testimony of all four co-workers, ALJ Miller confronted Ochoa with the irreconcilable conflict in testimony when Ochoa again took the stand:

JUDGE MILLER: Let me pose the question to you a little differently, Mrs. Ochoa. Now we just went through and you said, no, I never told Jake Gurley that. You were in the hearing room when Reta Thorn testified that you had said that you did not intend to move to Lenoir. You were in the hearing room when Johnny Jacobs said that you told him that you never intended to move to Lenoir. And I believe you - yes, you were in the hearing room when Susan Litaker said that you told her you never intended to move to Lenoir.

Are you telling me, the fellow has got to write the decision in this case, that those people are wrong, all four of them? Tr. 1016.

When pressed repeatedly by the ALJ, Ochoa eventually conceded that she had in fact purposely downplayed her intentions of moving to Lenoir from her co-workers at WMXC in order to protect her job at that station in case her application failed. Tr. 1015-16, 1019-20.

After the rebuttal hearing, ALJ Miller concluded that Ochoa had deliberately tried to mislead the FCC in her direct testimony and that she would be disqualified on that basis from the license competition. He acknowledged that

no character issue had been specifically designated against Ochoa at the evidentiary hearings, but he found that omission not controlling since all principals at a hearing who testify under oath should be on notice that the truth and veracity of their testimony is always an issue in the proceeding. See, Maria M. Ochoa, 7 FCC Rcd at 1866, para. 82 (ALJ 1992). (Joint Appendix ("J.A.") 327).

The Review Board affirmed the ALJ's findings and conclusions against Ochoa. See, Maria M. Ochoa, 9 FCC Rcd 6569 (Rev. Bd. 1992). Ochoa's petition for reconsideration was unsuccessful. See, Maria M. Ochoa, 9 FCC Rcd 56, 57-59, para. 10-19 (1993) (J.A. 343, 344-46). A second petition for reconsideration was dismissed as repetitious and unauthorized. See, Maria M. Ochoa, 10 FCC Rcd 142 (1995) (J.A. 357).

## I. DISCUSSION

### A. Ochoa's Disqualification

Appellant Ochoa claims that the Commission's findings of fact and conclusions of law are not supported by substantial evidence and are therefore arbitrary and capricious. 3/ We disagree.

---

3/ The Communications Act of 1934 provides that "review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall

be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious." 47 U.S.C. 402(e); see also, Federal Communications Comm'n v. WOKO, Inc., 329 U.S. 223, 228 (1946) (emphasizing that "the fact that [the Court] might not have made the same determination [about a licensee's eligibility] on the same facts does not warrant a substitution of judicial for administrative discretion since Congress has confided the problem to the latter").

---

Appellant first argues that her inconsistent testimony can be explained as a misunderstanding, that the witnesses who contradicted her testimony were biased against her for various reasons, or that they misinterpreted her statements, which were calculated merely to downplay the possibility that she might leave her job at WMXC. Contrary to Ochoa's portrayal, her disqualification was not the result of a simple misunderstanding. Upon reviewing the transcript of testimony, we find that the Review Board's assessment of what happened at the evidentiary hearing is supported by substantial evidence. The Board concluded:

> Ochoa is in error that she testified consistently throughout the hearing sessions. She explicitly declared at the initial hearing session that she had told her supervisors, Gurley and Thorn, and co-workers she would move to Lenoir if her application were granted and that Gurley was clearly

> aware of her plans. It was only after significant time, money, and efforts were expended by the opposing parties to refute this testimony that Ochoa disavowed it and conceded she had couched her statements to her supervisors and co-workers in the negative, and could understand how they misinterpreted her comments and arrived at a belief that she was not intending to move to Lenoir or to operate the station. In this regard, our affirmance of the ALJ's holding is not dependent on whether Ochoa was truthful or not to her co-workers about her future plans; rather, it is based solely on whether she testified candidly at hearing, and the testimony quoted above reveals that she did not.

7 FCC Rcd 6569, 6571 (Rev. Bd. 1992). Indeed, Ochoa had numerous opportunities during the course of the proceedings to realize that the candor of her testimony was at issue and to clarify any misunderstandings about her claims. Instead, she continued, up until the ALJ confronted her late in the rebuttal session, to deny what she later agreed to be true: that she gave her co-workers at WMXC the impression that she would not move to Lenoir even if she were granted the license for the Lenoir radio station.4/

---

4/ The transcript from the rebuttal session includes this interchange between ALJ Miller and Ochoa:

JUDGE MILLER: ... Did you tell [your co-workers], no, I am not going, I'll be here at WMXC, don't you worry about it, in order to protect your shoulder blades?

OCHOA: I probably led them to believe that. By couching everything I everything that I ever said about it in the negative....

JUDGE MILLER: ... And to continue it, to continue the line of thinking, because you told or gave them the impression that you were not going to go to Lenoir, didn't mean that you had abandoned your original intention of going to Lenoir? But that was something that you knew?

OCHOA: Right.

JUDGE MILLER: And you didn't want them to know?

OCHOA: Right. I mean I just - yeah.

JUDGE MILLER: All right. Proceed, Mr. Yelverton.

And you see, coming back to that first testimony, had you said to me, when I asked you those questions directly, had you said to me, Judge, I may have used words that conveyed the impression, your testimony today, conveyed the impression that I was going to stay with WMXC and he didn't need to worry, Jake was safe, he wouldn't be left high and dry without a sales manager, had that been your answer there, you see, I would --- there might have never been a rebuttal session.

OCHOA: (Laughter.) I wish I would have known. Tr. 1017-19.

In her exceptions, Ochoa argued that the ALJ erred in disqualifying her without first specifying a basic qualifying issue. It is true that the FCC may not disqualify an applicant for allegedly perjured testimony after the hearing record is closed where the applicant was never made aware that her testimony was being questioned. See, e.g., Pleasure Island Broadcasting, 6 FCC Rcd 4163, 4164, para. 10 (Rev. Bd. 1991). However, as the Review Board in Ochoa's case pointed out, there are situations in which "an applicant may be disqualified in the absence of a basic qualifications issue for candorless testimony occurring directly before the agency . . . ." Maria M. Ochoa, 7 FCC Rcd 6569, 6571 (Rev. Bd. 1992). See, e.g., William M Rogers, 92 FCC 2d 187, 199-201 (1982) (stating that lack of candor need not be specially designated as a hearing issue because "truth and candor are always in issue" in FCC hearings); Swan Creek Communications, Inc. v. FCC, 39 F.3d 1217, 1222-23 (D.C. Cir. 1994) ("Although the usual lack of candor finding is made after a hearing on the issue before the ALJ, where ... an irremediable conflict appears between records submitted to the Commission and testimony in the instant proceeding, the Board could properly make a lack of candor determination without an evidentiary hearing.") (citations omitted).

This court's decision in RKO General, Inc. v. FCC, 670 F.2d 215, 235 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982), articulated three conditions which must be

satisfied in order to disqualify an applicant without designating a character issue:

> First, not only must the misconduct occur directly before the agency, but it should be of such a blatant and unacceptable dimension that its existence cannot be denied. The FCC has satisfied itself in this case with regard to RKO, whose lack of candor "is abundantly clear." Second, although formal notice may not always be necessary, it should be evident that the party has some form of actual notice of the conduct said to be at issue, and must not be prejudiced by surprise. Finally, the party must be given an "opportunity to speak in (its) own behalf in the nature of a right of allocution."

670 F.2d at 235 (citations omitted). All three of these requirements are satisfied in this case. First, substantial evidence supports the Board's finding that Ochoa engaged in misrepresentation during the hearings, and it is well-established "that false statements in the course of the hearing process are, in and of themselves, of substantial significance, and that such false testimony may lead to disqualification." Old Time Religion Hour, Inc., 95 FCC 2d 713, 719 (Rev. Bd. 1983) (citations omitted).5/

The second prong of the RKO General test was satisfied here because Ochoa was on actual notice that the veracity of her

testimony was being challenged. ALJ Miller repeatedly expressed his concern about the sharp conflict in testimony between the appellant and the other witnesses on the issue of what she told co-workers about her intentions to relocate. Indeed, he called an extraordinary hearing just for the purpose of hearing rebuttal testimony and resolving the conflict between the two sides' assertions on this specific point. Tr. 240-43, 433-36, 582. At the hearings, four different witnesses took the stand at various points to testify that Ochoa had told them that she did not intend to leave WMXC-FM to move to Lenoir if her application were granted./6 In light of the ALJ's actions and the testimony of the other witnesses, Ochoa should have been on notice that her candor was specifically at issue. See, e.g., William M. Rogers, 92 FCC 2d 187, 1982 WL 190904 (F.C.C.), at *9 (finding, in a similar situation, that an applicant was not "deprived of his procedural rights because of a lack of notice that his candor was at issue"). Furthermore, in some cases the agency has held that no additional notice is required in situations in which applicants are aware that they are testifying under oath. For example, in Old Time Religion, the Commission explained that it was well-established that "specific notice to an applicant that he [or she] must testify truthfully is superfluous, and that such false testimony may lead to disqualification." 95 FCC 2d 713, 719 (Rev. Bd. 1983) (citations omitted). Old Time Religion thus suggests that witnesses

in FCC licensing proceedings are on notice that the candor of their testimony is at issue whenever they take an oath prior to testifying.

---

5/Ensuring candor in the licensing application process is of obvious and paramount concern to the FCC. Due to the nature of many of the Commission's comparative criteria for granting licenses (ie., the criteria are relatively easy to evade or falsify), it is imperative that prospective licensees testify with complete candor at these evidentiary hearings. See, e.g., Emission de Radio Balmeseda, Inc., 7 FCC Rcd 3852, 3858 (Rev. Bd. 1992) (explaining that the FCC's "demand for absolute candor [during the license application process] is itself all but absolute"). Accordingly, the Communications Act of 1934 requires that all license applications be under oath or affirmation. See, 47 U.S.C. 308(b). The Act also provides that any station license may be revoked for false statements in the application. See, 47 U.S.C. 312(a).

6/ Ochoa cites various evidence (in the rebuttal testimony and in her briefs) indicating that some or all of the four witnesses who testified as to her statements while she was still working at WMXC may have been biased against her. The ALJ determined that none of these witnesses were distorting their testimony in an effort to "get back" at Ochoa. Aside from the deference owed to the ALJ's conclusions about witness credibility, it

is clear from the record that Ochoa herself eventually admitted that she had made such statements to her co-workers. Thus, her final testimony about her own actions and the witnesses' testimony about her actions were not inconsistent. Thus, any animus the witnesses might have felt towards Ochoa was ultimately irrelevant to the lack of candor.

---

The third prong of the RKO General test is also met because Ochoa did have an opportunity to speak on her own behalf, both during the original evidentiary hearing and during the rebuttal session. Given the fact that she was on actual notice of the ALJ's concern with discrepancies in the witnesses' testimony, she had ample opportunity to clarify and elaborate upon her application for the license and her earlier testimony. Finally, it is irrelevant that Ochoa's false statements related only to statements to her co-workers, rather than to her actual intention to move to Lenoir. The Supreme Court has held that it is not important that an applicant's false statements pertain to issues that are immaterial to the pending application. See, FCC v. WOKO, Inc., 329 U.S. 223, 227 (1946) ("The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones."); see also, Richardson Broadcast Group, 7 FCC Rcd 1583 (1992) ("It is well-established . . .that the 'fact of concealment [during FCC hearings] may be more significant than

the facts concealed because it shows a willingness to deceive the Commission.") (quoting Character Qualifications, 102 FCC 2d 1179, 1210, n. 77 (1986)). 7/.

In addition to her claim that the FCC should have designated a specific character issue before disqualifying her for lack of candor, Ochoa argues that her disqualification was invalid because the Commission applied disparate standards to her application and Foothills' application. Ochoa maintains that, if Foothills had been held to the same standard of candor in the licensing proceeding as she was, Foothills also would have been disqualified./8 But appellant has failed to produce any significant evidence that the Review Board applied a more lenient standard to Foothills' application.9/ Thus, her argument must fail.

---

7/ For similar reasons, Ochoa's objection to ALJ Miller's refusal to subpoena Vanessa Keys to testify at the rebuttal sessions is unfounded. Not only was there a procedural flaw in her request, but she also failed to demonstrate that Keys would have introduced testimony that was different from that offered by the witnesses that were already testifying. See, J.A. 320. Keys was to testify that Ochoa actually intended to move to Lenoir, whereas the discrepancy in testimony related not to Ochoa's actual intentions, but only to what she had told her other co-workers

about her intentions.

8/ Foothills Broadcasting was disqualified for misrepresentation in the ALJ's initial decision. See, 7 FCC Rcd at 1863-64, paras. 28-44, 1869, paras. 11-19. However, the Review Board reversed this disqualification because it could find no deceptive intent or abusive conduct by Foothills. See, 7 FCC Rcd at 6575, paras. 28-29.

9/ The Commission considered this claim of Ochoa's in reviewing one of her petitions for reconsideration. See, Maria M. Ochoa, 9 FCC Rcd 56 (1993). Substantial evidence supports the Commission in concluding that her assertions that Foothills had engaged in misrepresentation in its license application were unfounded. See, id. at 56, paras.3-4 (finding no credible evidence that Foothills had been anything but candid in pledging its intentions of having integrated ownership and management at the Lenoir radio station).

---

For the foregoing reasons, we affirm the disqualification of Maria M. Ochoa from the Lenoir license application competition. The conclusions of the ALJ and the Review Board were supported by substantial evidence and were not arbitrary and capricious.

## II. OCHOA's LACK OF STANDING TO CHALLENGE THE GRANT OF THE LICENSE TO FOOTHILLS BROADCASTING

An applicant disqualified from competing for a broadcast license usually lacks standing to appeal the subsequent disposition of that license since, in most cases, no cognizable injury can be demonstrated by such a disqualified applicant. See, Garden State Broadcasting Ltd. Partnership v. FCC, 996 F.2d 386, 395 (D.C. Cir. 1993). Appellant argues that her situation should fall under the exception to the Garden State rule articulated in Jacksonville Broadcasting Corp. v. FCC, 348 F.2d 75 (D.C. Cir. 1965), in which a disqualified applicant was allowed to challenge the grant of a competing application because she had been the victim of a double standard which, if corrected, would have required the court to overturn both the plaintiff's disqualification and the other applicant's award of the license. In that case, there was a cognizable injury shown because the improperly disqualified applicant would have a new chance to attain the license once the improperly awarded license had been revoked.

Appellant's argument is unavailing. As appellee correctly argues, the Jacksonville exception is inapplicable here because, in Jacksonville, both applicants for the broadcasting license had engaged in the same misconduct (lobbying a Commissioner about a pending licensing proceeding), but only one of the

applicants was held accountable. See, Appellee's Brief, at 28 (citing Jacksonville, 348 F.2d at 77-80); accord Orange Park Florida TV Inc. v. FCC, 811 F.2d 664, 672 (D.C. Cir. 1987) (finding that a disqualified applicant could establish standing to challenge the FCC's award of a license in a case where, "[but for that award [to the other applicant], it would still be open season for [the disqualified applicant) in an effort to secure rights to channel 25"). In this case, by contrast, the Commission did not apply disparate standards to the license applications of Ochoa and Foothills. Therefore, Ochoa lacks standing to challenge the FCC's decision to grant the license to Foothills.

APPENDIX J, ORDER, U.S. COURT OF APPEALS, D.C. CIRCUIT, Case No. 95-1092 and Consolidated Case No. 95-1444, filed November 27, 1996

BEFORE: Wald, Williams, and Ginsburg, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed November 7, 1996, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer,
Clerk

BY: Robert A. Bonner
DEPUTY CLERK

APPENDIX K, PORTIONS OF HEARING TRANSCRIPT

Tr. 127

JUDGE MILLER: Maria Ochoa, you are excused and thank you for testifying.

THE WITNESS: Thank you.

MR. BERNARD: Your Honor, at this time I would like to move for permission to adduce rebuttal testimony. As you know, I have subpoenaed Ms. Reta Thorn to appear here at 10:30 this morning. Ms. Thorn is expected to testify, that she and Mrs. Ochoa discussed the Lenoir proceeding on at least two occasions, between late October or early November of 1990 and January 21 of 1991; that on both occasions, Mrs. Ochoa stated that she had no plans to leave her employment at WMXC if her Lenoir application was granted;

Tr. 128

that she planned to sell the Lenoir station if her application were granted and she did not want to live in a small town like Lenoir and would not move there.

Finally, Ms. Thorn is expected to testify that Mrs. Ochoa was terminated from her position, as general sales manager, for repeated failures to follow Ms. Thorn's directions.

I believe that the expected testimony bears on the integration proposal in this proceeding, whether, as Mrs. Ochoa has testified, she plans to move to Lenoir and whether she plans to work at the proposed station. They were not casual conversations that Ms. Thorn had with Mrs.

Ochoa, Ms. Thorn, obviously, was interested in knowing, as the general manager of WMXC, whether Mrs. Ochoa would, in fact, continue in the foreseeable future in her position, an important position at WMXC.

I submit to you that the testimony to be obtained from Ms. Thorn is both relevant and highly material to the ultimate issue in this proceeding.

JUDGE MILLER: Mr. Yelverton, there is a request for rebuttal outstanding here.

MR. YELVERTON: Yes. Your Honor

Tr. 129

JUDGE MILLER: Let me state, first of all, this may cause you some logistical problems, Mr. Bernard. If I take rebuttal, I might take it at the end of direct, total direct. I mean, I think it is proper for you to ask for rebuttal right now. Don't get me wrong, but it may be that I want to get all direct cases out of the way and then we will go right into rebuttal, right from there, in case there are other requests for rebuttal made as we go along. Are you following me?

MR. BERNARD: I will abide by Your Honor's rulings in that respect.

JUDGE MILLER: okay.

MR. BERNARD: I would like to get Ms. Thorn over today, but --

JUDGE MILLER: All right. But we will find out, right now, how Mr. Yelverton feels about rebuttal and we will find out with Mr. Kline, how he feels about rebuttal. He is for it, of course, Mr.

Kline is, but we will find out from Mr. Yelverton, who is against it.

MR. YELVERTON: Your Honor, Mr. Bernard deposed Mrs. Ochoa in early February and asked her the same questions about her integration proposal and her intention to move to Lenoir. He was aware

Tr. 130

of Ms. Thorn and he was aware of Mr. Gurley at that time. He had certainly ample opportunity to file a motion to enlarge issues, based on misrepresentation, following the close of the deposition.

This is a total surprise and I contend that Mr. Bernard is very tardy in bringing these matters to the attention of the court, either through a petition to enlarge issues or supplemental depositions. All the parties had a right to additional depositions, before a certain deadline, which --

JUDGE MILLER: Well, what kind of enlargement would he have sought? I mean, what Mr. Bernard has explained to me is that what he intends to go into, on rebuttal, bears directly on what her testimony has been on direct. Namely, within the framework of the standard comparative issue.

Now, what kind of an issue would he ask for?

MR. YELVERTON: Your Honor, that is correct, but Mr. Bernard asked essentially the same questions of Ms. Ochoa, at the depositions.

JUDGE MILLER: And you are not surprised. That is for sure.

MR. YELVERTON: As far as the questions he asked, it is no surprise. Following those depositions, certainly any statements a person makes at depositions

Tr. 131

is subject to petitions to enlarge issues; it is subject to rebuttal. Mr. Bernard had the opportunity to depose Ms. Thorn. I have not had the opportunity to depose her or examine her in any way.

JUDGE MILLER: You may get a chance. That is what we are debating, right now.

MR. YELVERTON: But with absolutely no preparation. You know, this is a total surprise and these are matters that Mr. Bernard could have brought to the attention of the court, well before March 19th. He was aware of what Mrs. Ochoa's testimony would be as of February 5th, 1991.

JUDGE MILLER: He may well be, but he is entitled to wait and be sure that is what this record says, before he asks for rebuttal. I don't think he was under the obligation. In fact, I will go one step further, Mr. Yelverton.

When Mr. Bernard presented me with the subpoena, I said to him, you may be bringing somebody for nothing, because you have to ask me for rebuttal and I have to agree that it is, in fact, legitimate rebuttal that you are going to take up. Is that a fair statement of what I said to you before, Mr. Bernard?

Tr. 132

MR. BERNARD: Yes, Your honor.

JUDGE MILLER: At the time I signed the subpoena?

Now let me explain to you, Mr. Yelverton. I am going to allow rebuttal here and let me tell you a couple of reasons why. I don't need to tell you about the views of the Review Board in Mableton, Georgia. I probably don't need to tell you,- even though this was not one of your cases, to tell you about the views of the Review Board in Montecito, California, about Claudia Bratton.

What I am saying to you is that this material that Mr. Bernard says he is going to adduce, if I prohibit that, I can see a remand coming right down the pike at me, just as sure as I am sitting here. And probably, a justifiable remand, because they will feel that everything has not been covered and especially on the permanency of the integration pledge.

**********

Tr. 1014-1015

JUDGE MILLER: "Did you ever tell Mr. Gurley that it was highly unlikely that your application would be granted because you intended to dismiss it in return for payment from the other applicants for the station?" Ochoa: "No, sir, I did not."

"Did you ever tell Mr. Gurley that, your being both a minority and a female, your application would look very strong and the other applicants would be concerned enough to make you an offer?"

The witness [Ochoa], "No, sir, I did not." Do you recall those questions and do you recall those answers?

OCHOA: Yes.

JUDGE MILLER: And those were the questions were asked you and those were the answers you gave?

OCHOA: Yes.

JUDGE MILLER: Proceed.

BY MR. YELVERTON: Ms. Ochoa, have you ever told Jake Gurley, any time, that you never -- and I emphasize the word "never -- had an intention to move to Lenoir?

OCHOA: No. My conversations with Jake were always, like I said earlier, were always couched in the negative, it's a long shot, I'm not sure if I can get it. It's a lengthy proceeding. Just so that I, just to reassure him that I was not resigning tomorrow.

YELVERTON: And by negative, tell me what you mean by that?

OCHOA: I never --- by negative, I guess by explaining all the negative

Tr. 1016

things that could happen. In other words, that I may not, that the application may never come to fruition.

JUDGE MILLER: Let me pose the question to you a little differently, Ms. Ochoa. Now we just went through what Jake Gurley said in a declaration and then we asked you, and you said, no, I never told Jake Gurley that. You were in the hearing room when Reta Thorn testified that you had said that you did not intend to move

to Lenoir. You were in the hearing room when Johnny Jacobs said that you told him that you never intended to move to Lenoir. And I believe you -- yes, you were in the hearing room when Susan Litaker said that you told her you never intended to move to Lenoir.

Are you telling me, the fellow who has got to write the decision in this case, that those people are wrong, all four of them?

OCHOA: I think what has happened is that they have misinterpreted what I have said. It just, if you knew me, you would know that it just goes against my nature to be so talkative about my private business. I just don't talk a lot about what I do in my private life. And often times, that even stirs up even more speculation, which is what I intended for it not to do. And I was often asked, because it's such a talky business and people love to talk, about my Lenoir application, and I would often, true to character, just give a quick, short

Tr. 1017

answer, well, I don't know, it's a long process, and it's a long shot. And I think that from those comments, they heard or misinterpreted what they wanted to hear and what they wanted to interpret.

JUDGE MILLER: In passing, I note that these, four people, three of them -- well, at least Reta Thorn and Jake Gurley were in a position to cause you serious problems if they suspected that you were going to leave the organization high and

dry, and from your testimony, I think you suspected that Johnny Jacobs had wires, was wired to Gurley, so that he could cause you problems if you left the organization high and dry. And you knew that Susan Litaker had been Jake Gurley's executive assistant and had probably had the ear of management and could leave you high and dry. And you, not only you needed, I would suspected you wanted to keep a $70,000 job with a $5,000 allowance and a car.

Did you tell them, no, I am not going, I'll be here At WMXC, don't you worry about it, in order to protect your shoulder blades?

OCHOA: I probably led them to believe that. By couching everything I everything that I ever said about it in the negative. I can understand --

JUDGE MILLER: And you wouldn't need --- wouldn't, for example, have to be so careful, you could express feelings

Tr. 1018

to Karen Barnes and no one would, you know, Karen can't hurt you.

OCHOA: Right.

JUDGE MILLER: And so that there"s a possibility that Karen Barnes could give a different perception of your future plans than say Jake Gurley, isn't that a possibility?

OCHOA: Sure.

JUDGE MILLER: And isn't that in fact what happened?

OCHOA: Yes.

JUDGE MILLER: Proceed, Mr. Yelverton.

JUDGE MILLER: And to continue it, to continue the line of thinking, because you told or gave them the impression that you were not going to go to Lenoir, didn't mean that you had abandoned your original intention of going to Lenoir? But that was something that you knew?

OCHOA: Right.

JUDGE MILLER: And you didn't want them to know?

OCHOA: Right. I mean I just -- yeah.

JUDGE MILLER: All right. Proceed, Mr. Yelverton.

JUDGE MILLER: And you see, coming back to that first testimony, had you said to me, when I asked you those questions directly, had you said to me, Judge, I may have used words that conveyed the

Tr. 1019

impression, your testimony today, conveyed the impression that I was going to stay with WMXC and he didn't need to worry, Jake was safe, he wouldn't be left high and dry without a sales manager, had that been your answer there, you see, I would -- there might have never been a rebuttal session.

OCHOA: (Laughter.) I wish I would have known.

JUDGE MILLER: But you said directly to me said "Did you tell Jake Gurley that?" and I was reading right off his statement, and you said "No, I did not." And went through that today, didn't we?

OCHOA: Yeah, and I was just answering your questions as specifically as possible. So that's ---

JUDGE MILLER: Proceed, Mr. Yelverton.

YELVERTON: Your Honor, I have no further questions.

JUDGE MILLER: Okay. Mr. Bernard.

CROSS-EXAMINATION

BERNARD: Ms. Ochoa, do you recall being asked at the earlier session of this proceeding whether you had told Mr. Gurley that you filed your application in Lenoir?

Tr. 1020

OCHOA: Yeah. Yes.

BERNARD: Do You recall, I think Mr. Kline asked you this question,

JUDGE MILLER: Where are we at?

BERNARD: P. 81 of the transcript, your honor. Mr. Kline asked you, I can you show this, on line 4 here, p. 81, maybe you want to look over line So. (The document was proffered to the witness.)

OCHOA: Yes.

BERNARD: I think he asked you up here if you had told your supervisor and asked you who your supervisor was.

OCHOA: Uh-huh.

BERNARD: And it was Mr. Jake Gurley. And then he asked you, "Did you tell them... "referring to your supervisor and your co-workers, "... that in your application you are proposing to move to Lenoir?" And what was your answer?

OCHOA: That he did ask me that. If I was -- he says, well, in the course of the conversation, he says, well, you know, what if you win it? What if all those things, I mean what if you actually do win it? Well, if I actually do win it, yeah,

I'd move to Lenoir, but that's still a long time in the future.

BERNARD: So that you gave him more than the negative information that you talked about earlier?

Tr. 1021

OCHOA: With that one affirmative, you're right.

BERNARD: So your testimony, as given in the earlier proceeding, was true?

OCHOA: Yes.

Tr. 1024

JUDGE MILLER: Did you say "no")

OCHOA: No, I said yes, but I said fifteen times for that one affirmative answer, I gave fifteen reasons why it would never come to be, so I can understand how she would have gotten from that conversation that I would said no.

JUDGE MILLER: So I understand what you are saying to me now that this, really, on the part of these four people, this was just a big misunderstanding?

OCHOA: Yes.

JUDGE MILLER: Go ahead, Mr. Bernard.

Supreme Court, U.S.
FILED
APR 14 1997
OFFICE OF THE CLERK

No. 96-1358

# In the Supreme Court of the United States

OCTOBER TERM, 1996

MARIA M. OCHOA, PETITIONER

*v.*

FEDERAL COMMUNICATIONS COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

WALTER DELLINGER
*Acting Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

WILLIAM E. KENNARD
*General Counsel*
DANIEL M. ARMSTRONG
*Associate General Counsel*
GREGORY M. CHRISTOPHER
*Counsel*
*Federal Communications Commission*
*Washington, D.C. 20554*

## QUESTIONS PRESENTED

1. Whether the Federal Communications Commission properly disqualified petitioner's application for a radio license based on petitioner's false testimony at the licensing hearing, even though the Commission had not specifically identified petitioner's veracity as an issue to be decided at the hearing.

2. Whether substantial evidence supports the Commission's disqualification decision.

3. Whether petitioner has standing to challenge the award of a radio license to a competitor even though her own application for the license was disqualified because of her lack of veracity.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Statement | 2 |
| Argument | 8 |
| Conclusion | 13 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *ABF Freight System* v. *NLRB*, 510 U.S. 317 (1994) | 9 |
| *Bechtel* v. *FCC*, 10 F.3d 875 (D.C. Cir. 1993) | 2 |
| *Cole* v. *Arkansas*, 333 U.S. 196 (1948) | 9 |
| *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946) | 8, 9 |
| *Garden State Broadcasting Ltd.* v. *FCC*, 996 F.2d 386 (D.C. Cir. 1993) | 12 |
| *Grenco, Inc.*, 39 F.C.C.2d 732 (1973) | 9 |
| *Jacksonville Broadcasting Corp.* v. *FCC*, 348 F.2d 75 (D.C. Cir.), cert. denied, 382 U.S. 893 (1965) | 12 |
| *Melody Music, Inc.* v. *FCC*, 345 F.2d 730 (D.C. Cir. 1965) | 12 |
| *Old Time Religion Hour, Inc.*, 95 F.C.C.2d 713 (1983) | 8 |
| *Oliver, In re*, 333 U.S. 257 (1948) | 9 |
| *RKO General, Inc.* v. *FCC*, 670 F.2d 215 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982) | 7, 9, 11 |
| *Richardson Broadcast Group*, 7 F.C.C. Rcd 1583 (1992), aff'd *sub nom. Younts* v. *FCC*, No. 92-1119, 1993 WL 185669 (D.C. Cir. May 10, 1993) | 8-9 |
| *Ruffalo, In re*, 390 U.S. 544 (1968) | 9 |

Cases—Continued: Page

*Silver Star Communications-Albany, Inc.*, 6 F.C.C. Rcd 6905 (1991) ..... 10
*Steadman* v. *SEC*, 450 U.S. 91 (1981) ..... 10
*William M. Rogers*, 92 F.C.C.2d 187 (1982) ..... 9

Miscellaneous:

*Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965) ..... 2

# In the Supreme Court of the United States

OCTOBER TERM, 1996

---

No. 96-1358

MARIA M. OCHOA, PETITIONER

*v.*

FEDERAL COMMUNICATIONS COMMISSION

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

## BRIEF FOR THE RESPONDENT IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 121a-139a) is unpublished, but the decision is noted at 98 F.3d 646 (Table). The decision of the administrative law judge disqualifying petitioner's application (Pet. App. 10a-50a) is reported at 7 F.C.C. Rcd 1861. The decision of the Review Board affirming that disqualification (Pet. App. 51a-80a) is reported at 7 F.C.C. Rcd 6569. The decision of the Federal Communications Commission also affirming that disqualification (Pet. App. 81a-92a) is reported at 8 F.C.C. Rcd 3135. Decisions of the Commission denying reconsideration (Pet. App. 93a-117a, 118a-119a) are reported at 9

F.C.C. Rcd 56 and 10 F.C.C. Rcd 142. A further decision of the Commission denying petitioner's petition for review (Pet. App. 120a) is reported at 10 F.C.C. Rcd 8746.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 121a) was entered on September 23, 1996. A petition for rehearing was denied on November 27, 1996. Pet. App. 140a. The petition for a writ of certiorari was filed on February 25, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner was one of eight applicants for authority to operate a new FM radio station in Lenoir, North Carolina. Under the Federal Communication Commission's broadcast licensing policy then in effect, one of the principal comparative criteria applied was the degree to which any applicant proposed to "integrate" its ownership with the on-site daily management of the proposed station. *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 395 (1965). In an effort to gain an important comparative advantage under this integration criterion, petitioner pledged in her application to sever her connection with her current employer (broadcast station WMXC in Charlotte, North Carolina) if her application were granted, to move to Lenoir, and to manage the new station full-time.[1]

---

[1] While this proceeding was pending before the agency, the Commission's integration policy was struck down in *Bechtel* v. *FCC*, 10 F.3d 875 (D.C. Cir. 1993). Because the Commission did not find it necessary to reach the comparative issues in this case, the *Bechtel* decision is irrelevant here.

The administrative law judge (ALJ) held an evidentiary hearing to consider the competing applications. Petitioner was questioned at the hearing about her promise to move to Lenoir if her application succeeded. She reiterated that commitment and testified that she had informed her coworkers at WMXC of her commitment. Pet. App. 25a-26a. On cross-examination, petitioner denied telling the general manager of WMXC, Jake Gurley, that her real plan was to dismiss her application in return for a monetary settlement, and denied telling Gurley that in the event of a grant of her application she would sell the station and remain at WMXC. *Id.* at 27a. Petitioner repeated her testimony even after she was shown a sworn statement by Gurley in which he contradicted her story. *Ibid.*

Faced with this potentially critical conflict in testimony about conversations between petitioner and her coworkers, the ALJ scheduled an extraordinary hearing session for the taking of rebuttal testimony about petitioner's intention to move to Lenoir if her application were granted. At the rebuttal hearing, Rita Thorne, who succeeded Gurley as general manager of WMXC, testified that she had asked petitioner if she intended to leave WMXC and move to Lenoir if her application were granted, and that petitioner had replied that she did not. Instead, according to Thorne, petitioner had said that she planned to sell the station if she won the license. Pet. App. 28a. Edward Jablonski, who worked under petitioner as local sales manager of WMXC, also testified that petitioner had indicated to him that she did not intend to move to Lenoir, but rather that she intended to be "bought out," and that her real goal was to become general manager of WMXC. *Id.* at 28a-29a. Jake Gurley also

testified, reiterating the statements in his earlier declaration that petitioner had told him that she did not intend to leave WMXC but, rather, planned to dismiss her application in return for a profitable settlement. *Id.* at 30a. Finally, Susan Litaker, WMXC's business manager, testified that she had asked petitioner, in Gurley's presence, why she wanted to go to Lenoir when she had a good job with WMXC. According to Litaker, petitioner replied that she "didn't want to run the Lenoir station, she merely wanted to file the application and sell it." *Id.* at 29a-30a.

Petitioner presented the testimony of four witnesses, who supported her story that she in fact intended to move to Lenoir if she won the station license. Those witnesses did not, however, offer any testimony about the statements that petitioner had made to her coworkers. Pet. App. 30a-31a, 55a. Petitioner also took the stand again at the close of the rebuttal session and revised the testimony that she had given earlier. Whereas previously she had testified that she had told her coworkers of her intent to move to Lenoir and to manage the new station, she testified on rebuttal that she had evasively "cast all her statements in the negative" to them because she had wanted them to believe that she intended to stay at WMXC, so that she could protect her job in the event that her application failed. *Id.* at 31a.

After observing the demeanor of all the witnesses and considering their conflicting testimony, the ALJ concluded that petitioner had deliberately tried to mislead the Commission about her intent to move to Lenoir, and that she was therefore not qualified to be a licensee. Pet. App. 32a. The ALJ stressed that "[w]e are now dealing with a principal who testified

falsely in open hearing." *Ibid.* The ALJ also noted that, although petitioner's opponents had not expressly placed petitioner's character in issue at the hearing, "[a]n implicit character issue exists with respect to the truth and veracity of every witness who is a principal in a hearing case." *Id.* at 33a. While issues are normally designated specifically "to place an applicant on notice of the charges he or she will be required to meet at the hearing[,] * * * notice to an applicant that he or she must testify truthfully and not conceal material information is superfluous," because "[t]hat's what the oath is for." *Ibid.*

2. On exceptions, the Review Board upheld the ALJ's disqualification of petitioner. The Review Board held that the absence of a designated misrepresentation issue did not preclude the ALJ from disqualifying petitioner on the basis of her false testimony at the hearing. The Board observed:

> The Commission has long held that false statements in the course of the hearing process are, in and of themselves, of substantial significance, that specific notice to an applicant that he [or she] must testify truthfully is superfluous, and that such false testimony may lead to disqualification.

Pet App. 58a. Moreover, the Board said, the ALJ placed petitioner on notice that her truthfulness had been challenged and provided her with ample opportunity to address the matter when he established procedures for rebuttal testimony. *Id.* at 58a-59a. The Board emphasized that its affirmance of the ALJ's disqualification decision was not dependent on whether petitioner was truthful or not with her

colleagues about her future plans; rather, the Board explained, "it is based solely on whether she testified candidly at hearing, and the testimony quoted above reveals that she did not." *Id.* at 59a.

The Commission also affirmed the disqualification decision. It rejected petitioner's argument that she could not fairly be disqualified for her misrepresentations absent a previous, formal specification of her veracity as an issue. Pet. App. 83a. The Commission stated that "the absence of formal notice in this instance [that petitioner's truthfulness was at issue] is a mere technicality, as [petitioner] had actual notice that the veracity of her testimony regarding her pertinent comments to WMXC employees was at issue and had ample opportunity thereafter to adduce evidence bearing on that question." *Id.* at 84a. The Commission also affirmed the evidentiary findings of deliberate misrepresentation. *Id.* at 85a-92a.

Following petitioner's disqualification, the license was awarded to the only remaining qualified applicant, Foothills Broadcasting, Inc. The Commission rejected petitioner's attempt to seek review of the grant of the license to Foothills. Pet. App. 120a.[2]

3. In an unpublished decision, the court of appeals affirmed the Commission's decision to disqualify petitioner, and rejected for lack of standing petitioner's attempt to seek review of the award of the license to Foothills. Pet. App. 121a-139a. The court observed that petitioner had had "numerous opportunities dur-

---

[2] The ALJ had disqualified Foothills for misrepresenting its ownership structure, Pet. App. 44a-46a, but the Review Board found no intent to deceive or other abusive conduct warranting disqualification, *id.* at 75a-76a. The other applicants were dismissed or disqualified and did not seek review.

ing the course of the proceedings to realize that the candor of her testimony was at issue." *Id.* at 129a. The court also relied on previous case law in which it had held that, under appropriate circumstances, the Commission may disqualify a license application based on the applicant's misconduct, even if the applicant's veracity had not been specifically designated as an issue to be decided at the hearing:

> First, not only must the misconduct occur directly before the agency, but it should be of such a blatant and unacceptable dimension that its existence cannot be denied. * * * Second, although formal notice may not always be necessary, it should be evident that the party has some form of actual notice of the conduct said to be at issue, and must not be prejudiced by surprise. Finally, the party must be given an opportunity to speak in (its) own behalf in the nature of a right of allocution.

Pet. App. 132a (quoting *RKO General, Inc.* v. *FCC*, 670 F.2d 215, 235 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982)) (internal quotation marks omitted).

The court found all three of its *RKO General* conditions satisfied in this case. The court ruled first that there was "substantial evidence" to support the Review Board's finding that petitioner engaged in misrepresentations during the hearing. Pet. App. 132a. Second, the court held that petitioner had actual notice that the veracity of her testimony was being challenged because the ALJ called the extraordinary hearing precisely to resolve the conflict in the testimony "on the issue of what she told her coworkers about her intentions to relocate." *Id.* at 133a. Third, the court emphasized that petitioner had had

an opportunity to speak on her own behalf, at both the original hearing and the rebuttal hearing. *Id.* at 134a.

The court also ruled that petitioner had no standing to challenge the Commission's decision to award the license to a rival applicant. The court agreed with the Commission that "[a]n applicant disqualified from competing for a broadcast license usually lacks standing to appeal the subsequent disposition of that license since, in most cases, no cognizable injury can be demonstrated by such a disqualified applicant." Pet. App. 138a.

## ARGUMENT

1. Petitioner argues (Pet. 13-21) that she was denied due process when the administrative law judge (ALJ) disqualified her license application on the basis of her false testimony about her intent to move to the community where the licensee was located. She contends that she was deprived of a fair hearing because the ALJ did not specifically designate her candor in testifying or her character as an issue to be decided at the license hearing. That contention is without merit.

Candor in FCC proceedings is a matter of the highest concern to the Commission. See *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946). The Commission has therefore made clear, in a series of decisions, that a license applicant's candor is always an issue in Commission proceedings, and that applicants are therefore on notice that "false statements in the course of the hearing process are, in and of themselves, of substantial significance." *Old Time Religion Hour, Inc.*, 95 F.C.C.2d 713, 719 (1983); see also *Richardson Broadcast Group*, 7 F.C.C. Rcd 1583, 1585 (1992), aff'd *sub nom. Younts* v. *FCC*, No. 92-1119,

1993 WL 185669 (D.C. Cir. May 10, 1993) (noted at 955 F.2d 306) (Table); *William M. Rogers*, 92 F.C.C.2d 187, 189 (1982); *Grenco, Inc.*, 39 F.C.C.2d 732, 736-737 (1973). Cf. *ABF Freight System* v. *NLRB*, 510 U.S. 317, 323 (1994) (noting that NLRB could have disqualified employee from "profiting from the [administrative] proceeding," i.e., from reinstatement and backpay remedies, based on his false testimony under oath); *id.* at 326 (Kennedy, J., concurring) (same).

Petitioner argues that due process required that the ALJ specifically designate her candor in advance as an issue for the license proceeding, so that she could defend herself against the charge of lack of candor. But unlike the cases on which petitioner principally relies—which involved a criminal proceeding (*Cole* v. *Arkansas*, 333 U.S. 196 (1948)), a trial for criminal contempt (*In re Oliver*, 333 U.S. 257 (1948)), and disbarment (*In re Ruffalo*, 390 U.S. 544 (1968))—"[a] denial of an application for a license because of the insufficiency or deliberate falsity of the information lawfully required to be furnished is not a penal measure." *FCC* v. *WOKO, Inc.*, 329 U.S. at 228. The Commission's purpose in disqualifying applicants who lack candor "is not to punish [them] for past wrongs, but to ensure that [licensees,] fiduciaries of a great public resource[,] will satisfy the highest standards of character commensurate with the public trust that is reposed in them." *RKO General, Inc.* v. *FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981) (internal quotation marks omitted), cert. denied, 456 U.S. 927 (1982). And, given the clear FCC precedent that candor is always at issue, all license applicants are on notice that their lack of truthfulness in testifying may provide a basis for disqualification. Accordingly, the "fluid" standards of due process (*RKO General*, 670 F.2d at 232)

do not require that an ALJ expressly designate a licensee's candor as a matter for decision.

Nor was petitioner deprived of a fair opportunity to litigate the issue of lack of candor. Because the ALJ notified the parties that the conflict in testimony between petitioner and Gurley was the matter to be resolved at the rebuttal hearing, petitioner was aware that her credibility was at the crux of the issue to be decided by the ALJ. See Pet. App. 58a-59a (Review Board noting that the ALJ "established procedures for the second phase of the proceeding that clearly placed [petitioner] on notice that her truthfulness was at issue and provided her with ample opportunity to address the matter"). Petitioner had a full opportunity to speak on her own behalf at the rebuttal hearing; she therefore had a fair opportunity to contest the implication, raised by the conflict between her testimony and Gurley's affidavit, that she was testifying falsely.

2. Petitioner argues (Pet. 22-24) that the Commission departed from the "preponderance of the evidence standard" set forth in *Steadman* v. *SEC*, 450 U.S. 91 (1981), when it disqualified petitioner's application based on "inferences" that it drew about her lack of candor. *Steadman*, however, involved the standard of persuasion applicable to a disciplinary proceeding in which the SEC sanctioned an investment adviser for violations of the securities laws, and in which the SEC has the burden of proof. See also *Silver Star Communications-Albany, Inc.*, 6 F.C.C. Rcd 6905 (1991) (applying preponderance of evidence standard in license *revocation* proceeding based on misconduct). In this case, by contrast, the disqualification of petitioner's application was not a sanction imposed on her for past violations, but a conclusion that she was not

eligible to participate in a proceeding to award a license in the future. See *RKO General*, *supra*.

Moreover, even if *Steadman* is applicable here, there is no contradiction between the preponderance of the evidence standard and the ALJ's reaching a conclusion about petitioner's lack of candor based on inferences from conflicting testimony. The ALJ clearly found that petitioner had testified falsely, after reviewing all the evidence in the record; he did not find only that there was substantial evidence to conclude that petitioner had testified falsely. Pet. App. 32a-33a. The Review Board likewise found that "the testimony * * * reveals that [petitioner] did not [testify truthfully]." *Id.* at 59a. Those determinations by the ALJ and the Review Board were then upheld by the Commission and the court of appeals as supported by substantial evidence. *Id.* at 87a, 128a. The case-specific application of the preponderance of the evidence standard by the ALJ and the Review Board raises no legal issue worthy of this Court's review.

3. Petitioner argues last (Pet. 25-30) that the court of appeals erred in concluding that, because her own application had been disqualified based on her lack of candor, she lacked standing to challenge the grant of a license to a rival applicant, Foothills. As the court of appeals correctly concluded, however, petitioner could show no injury traceable to the award of the license to Foothills because her own application could not be considered, based on its disqualification. See Pet. App. 138a. Any decision that a reviewing court might reach about the correctness of the FCC's award of the license to Foothills would have no effect on petitioner's opportunity to apply for the license.

See *Garden State Broadcasting Ltd.* v. *FCC*, 996 F.2d 386 (D.C. Cir. 1993).

Petitioner relies on *Jacksonville Broadcasting Corp.* v. *FCC*, 348 F.2d 75 (D.C. Cir.), cert. denied, 382 U.S. 893 (1965), and *Melody Music, Inc.* v. *FCC*, 345 F.2d 730 (D.C. Cir. 1965), but those cases do not support a different result here. In those cases, the court held that the Commission was obliged to explain a difference in treatment of two applicants or licensees, both of whom had engaged in the *same* misconduct. A finding, in those cases, that the Commission had unfairly applied different standards to the two applicants would have required the court "to overturn *both* the unsuccessful applicant's disqualification and the award of the license to the applicant." *Garden State*, 996 F.2d at 395-396. But in this case, the Commission did not apply disparate standards of disqualification to petitioner and to Foothills, as the court of appeals found. Pet. App. 136a, 139a. Accordingly, petitioner lacks standing to challenge the Commission's decision to award the license to Foothills.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
*Acting Solicitor General*

WILLIAM E. KENNARD
*General Counsel*

DANIEL M. ARMSTRONG
*Associate General Counsel*

GREGORY M. CHRISTOPHER
*Counsel*
*Federal Communications Commission*

APRIL 1997

Supreme Court, U.S.
FILED
APR 24 1997
CLERK

(4)

Case No. 96-1358

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

---

MARIA M. OCHOA,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent

---

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

---

# PETITIONER'S REPLY BRIEF

---

Stephen T. Yelverton, Esq.
Counsel of Record
Yelverton Law Firm, P.C.
1101 30th St., N.W.,
Suite 500
Washington, D.C. 20007
Tel. 202-625-4321

11pp

TABLE OF CONTENTS

TABLE OF CONTENTS . . . . . i

TABLE OF AUTHORITIES . . . . . ii

PETITIONER'S REPLY BRIEF . . . . . 1

(a) The Petition Should Be Granted in Order to Resolve the Issue as to Whether In Re Ruffalo, 390 U.S. 544 (1968), is Applicable to FCC Broadcast Licensing Administrative Hearings . . . . . 1

(b) The Petition Should Be Granted in Order to Resolve the Issue as to Whether Steadman v. SEC, 450 U.S. 91, 101 (1981), is Applicable to FCC Broadcast Licensing Administrative Hearings . . . . . 4

(c) The Petition Should Be Granted Because the Respondents Made Wholly Inconsistent Contentions in Their Opposition Brief . . . . . 6

Conclusions . . . . . 8

# TABLE OF AUTHORITIES

Page(s)

Federal Communications Commission Decisions

D&E Broadcasting, Inc., 1 FCC2d 78 (1965) . . . . . 5

Silver Star Communications-Albany, Inc., 6 FCC Rcd 6905 (1991) . . . . . 5

Federal Court Decisions

Garden State Broadcasting Ltd. Partnership v. FCC, 996 F.2d 386 (D.C. Cir. 1993) . . . . 7

In Re Ruffalo, 390 U.S. 544 (1968) . . . . . 1-4, 7

Steadman v. SEC, 450 U.S. 91 (1981) . . . . . 4-7

Statutes

18 U.S.C. 1621 . . . . . 2, 5

U.S. Constitution

Fifth Amendment . . . . . 1

# PETITIONER'S REPLY BRIEF

Petitioner, Maria M. Ochoa, by her counsel, hereby submits her brief in reply to the brief in opposition to her petition for certiorari filed by the Respondents' Solicitor General and the Federal Communications Commission ("FCC").

The contentions of the Respondents show why the Court should grant the petition of Ochoa. The Respondents attempt to unduly limit the scope of established precedent of this Court, and in support of their position, they present wholly inconsistent arguments.

(a) The Petition Should Be Granted in Order to Resolve the Issue as to Whether In Re Ruffalo, 390 U.S. 544 (1968), is Applicable to FCC Broadcast Licensing Administrative Hearings.

In her petition, at pp. 13-21, Ochoa contended that the FCC denied her "due process" under the Fifth Amendment of the U.S. Constitution by sanctioning and disqualifying her for deceit based upon testimony which she gave at an FCC broadcast licensing administrative hearing. In so doing, the FCC failed to give her notice at the hearing as to charges of disqualifying deceit based upon such testimony.

The imposition of sanctions by the FCC in these circumstances is prohibited by In Re Ruffalo, 390 U.S. 544, 551-552 (1968). Therein, the Court held that

where a sanction or penalty is imposed by an agency, the affected person is entitled to "procedural due process," which includes "fair notice" at the hearing of the charges of disqualifying misconduct.

In their opposition, at p. 9, the Respondents contend that In Re Ruffalo does not apply to FCC broadcast licensing administrative hearings because no sanctions or penalties are involved in merely denying a broadcast license to a competing applicant vying for a public resource. However, the FCC did not merely deny Ochoa's application for a broadcast license because she was not the most qualified of all the competing applicants. Rather, it sanctioned Ochoa for deceit (App. 48a, 51a, 81a, 97a). This sanction carries with it possible criminal penalties for perjury before a Federal agency. See, 18 U.S.C. 1621.

Regardless of the characterization of the nature of the FCC's action against Ochoa, In Re Ruffalo would nevertheless be applicable. There, the petitioner was disbarred from the practice of law. Here, Ochoa was disbarred or disqualified from holding a Federal broadcast license. There is no decisionally significant distinction between these two actions for purposes of whether "procedural due process" by a government agency is required.

Accordingly, the contentions of the Respondents that In Re Ruffalo does not

apply to FCC broadcast licensing administrative hearings are wholly erroneous. Such arguments demonstrate why certiorari should be granted.

Although In Re Ruffalo has been the law of the land since at least 1968, the FCC refuses to be bound by its holding. Thus, certiorari should be granted to determine the scope and applicability of In Re Ruffalo to FCC broadcast licensing administrative hearings and to other similar types of Federal administrative hearings.

In their opposition, at p. 10, the Respondents contend that Ochoa knew that her credibility and truthfulness were at issue in the FCC administrative hearing. However, this contention is contradicted and undermined by the U.S. Court of Appeals for the D.C. Circuit which observed that Ochoa "should have been on notice that her candor was specifically in issue" (App. 133a).

Regardless of what Ochoa knew at the hearing, or should have known, as to the nature of the issues in controversy, it is undisputed that during the hearing the Administrative Law Judge ("ALJ") never told Ochoa that he considered her hearing testimony to be evasive, lacking candor, untruthful, or contradictory with her previous testimony, and the ALJ never gave her an opportunity at the hearing to clarify or correct any hearing testimony which he subsequently first determined

after the hearing to be disqualifying deceit (App. 141a-151a).

However, such notice to a person while testifying is required by In Re Ruffalo, 390 U.S. at 551-552. It holds that charges cannot be made or be amended on the basis of the testimony of the accused at the hearing, if he or she is given no opportunity at the hearing to expunge the testimony in question.

Accordingly, the refusal of the FCC to be bound by the "procedural due process" requirements of In Re Ruffalo demonstrates why certiorari should be granted. Federal administrative agencies must be subject to the same "procedural due process" requirements as are other governmental entities.

(b) The Petition Should Be Granted in Order to Resolve the Issue as to Whether Steadman v. SEC, 450 U.S. 91, 101 (1981) is Applicable to FCC Broadcast Licensing Administrative Hearings.

In her petition, at pp. 22-24, Ochoa contended that the FCC's reliance upon mere "inferences" from her hearing testimony to find conflicts in her testimony, or to find deceit by her, to serve as a basis to impose the sanction of disqualification is contrary to Steadman v. SEC, 450 U.S. 91, 101 (1981). This precedent mandates use of the higher "preponderance of [substantial] evidence" standard" and not the minimal "substantial

evidence" standard to impose the sanction of disqualification against a person in a Federal administrative hearing.

In their opposition, at p. 10, the Respondents contend that Steadman v. SEC is not applicable to the case of Ochoa because she was not sanctioned, but merely had her broadcast license application denied. However, as previously noted, the FCC sanctioned Ochoa for deceit (App. 48a, 51a, 81a, 97a). This sanction carries with it possible criminal penalties for perjury before a Federal agency. See, 18 U.S.C. 1621.

In their opposition, at p. 10, the Respondents also contend that Steadman v. SEC is not applicable to the case of Ochoa because the FCC did not have the burden of proof. However, under its own established policies, the FCC did have the burden of proof, but refused to assume it. D&E Broadcasting, Inc., 1 FCC2d 78, 80 (1965).

In their opposition, at p. 11, the Respondents concede that the FCC disqualified Ochoa based upon "inferences" from her hearing testimony. However, according to the Respondents, "inferences" meet the higher "preponderance of [substantial] evidence" standard.

The Respondents ignore that, in Silver Star Communications-Albany, Inc., 6 FCC Rcd 6905, 6906, para. 18 (1991), the FCC acknowledged that "inferences" from hearing testimony do not meet the

"preponderance of [substantial] evidence" standard of proof. Rather, such "inferences" only constitute minimal "substantial evidence."

Accordingly, certiorari should be granted to determine whether Steadman v. SEC is applicable to FCC broadcast licensing proceedings where sanctions for deceit are imposed against an applicant. Moreover, certiorari should be granted to determine whether, as a matter of law, "inferences" from hearing testimony (in making findings to impose the sanction of disqualifying deceit) meet the higher "preponderance of [substantial] evidence" standard, or only meet the minimal "substantial evidence" standard.

This is an important Federal question of law which should be resolved because the FCC refuses to be bound by the dictates of Steadman v. SEC. All Federal administrative agencies should be bound by the same rule of law.

(c) The Petition Should Be Granted Because the Respondents Made Wholly Inconsistent Contentions in Their Opposition Brief.

In her petition, at pp. 25-30, Ochoa contended that she has standing as a "private attorney general" to challenge the grant of the competing applicant, Foothills Broadcasting, Inc., in order to raise issues of disparate and discriminatory treatment by the FCC where it improperly favored a white male

applicant over her, a minority female applicant. Although the ALJ found that Foothills engaged in disqualifying deceit as to its application proposal, the FCC reversed those credibility findings on specious grounds and granted its application (App. 18a-24a, 44a-46a).

In their opposition, at pp. 11-12, the Respondents do not directly address the contentions of Ochoa. Rather, they contend that Ochoa does not have standing to challenge the grant of a competing application because she was disqualified by the FCC for lack of candor.

However, this contention is wholly inconsistent with other contentions made by the Respondents in their opposition. They contend, at pp. 9-10, that In Re Ruffalo, 390 U.S. 544 and Steadman v. SEC, 450 U.S. 91, 101, do not apply to the case of Ochoa because her application was merely denied and she was not sanctioned.

However, the Respondents cannot have it both ways. If Ochoa was not sanctioned for disqualifying deceit, she would be eligible to reapply for the broadcast license in question. If she is eligible to reapply, she has undisputed standing to challenge the grant of the application of Foothills, the competing applicant for the broadcast license in question. Garden State Broadcasting Ltd. Partnership v. FCC, 996 F.2d 386, 395 (D.C. Cir. 1993).

The Respondents also ignore that the

FCC previously gave Ochoa standing to challenge the grant of the competing application of Foothills. This was done after Ochoa was sanctioned for disqualifying deceit (App. 119a). The FCC is again attempting to have it both ways.

The inconsistent contentions of the Respondents demonstrate why certiorari should be granted. The FCC has no consistent or coherent policy as to standing by a disqualified applicant to contest the improper grant of a competing applicant. Thus, certiorari should be granted to resolve this important question of Federal law.

## Conclusions

WHEREFORE, in view of the foregoing, the petition of Ochoa raises important questions of Federal law, with respect to administrative agencies, which should be resolved by the Court. Accordingly, certiorari should be granted.

Respectfully submitted,

MARIA M. OCHOA

Stephen T. Yelverton, Esq.
Counsel of Record
Yelverton Law Firm, P.C.
1101 30th St., N.W.
Suite 500
Washington, D.C. 20007
Tel. 202-625-4321